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IN THE

Supreme Court of the United States

October Term, 1953

347 U.S.
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No. 630

CHARLES CHAPLIN,
Petitioner,

vs.

HON. JOHN W. CLANCY,
Respondent.

CHARLES CHAPLIN,
Third Party Defendant-Petitioner,

vs.

RINA M. KRAVETZ, as Executrix, etc.,
Defendant-Respondent,

and

MARY PICKFORD,
Plaintiff,

and

THE PICKFORD CORPORATION, UNITED ARTISTS CORPORATION, ARTHUR B. KRIM, ROBERT S. BENJAMIN, SEYMOUR M. PEYSER, MATTHEW FOX, WALTER E. HELLER & CO. INC., PAUL V. McNUTT and FRANK L. McNAMEE,
Third Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MYLES J. LANE,
Counsel for Petitioner.

APPELLATE PRESS CORP., 114 WORTH STREET, N. Y., COrtlandt 7-7627

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Third Party Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Charles Chaplin prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on February 11, 1954, denying a petition for a writ of

mandamus or, in the alternative, for a common law writ of certiorari.

Opinion Below

The opinion of the Court below (92)* is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 11, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Statutes Involved

The pertinent statutory provisions are printed in Appendix A, *infra,* page 23.

Questions Presented

1. Has a Court of Appeals the power to review the pre-remand proceedings of a District Court, where, after an improper removal, a party has been brought into a case by means of an illegal service of Federal process.

2. Has a Court of Appeals the power, prior to remand, to exercise its appellate jurisdiction by way of an appropriate extraordinary writ, in a case where the right to review a prejudicial ruling of a District Court is otherwise precluded.

3. Is it error for a Court of Appeals to withhold such relief, on a theory that the District Court's ruling should be reviewed by a State Court.

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* Unless otherwise indicated, references are to pages of the printed record.

4. Is it error for the Court of Appeals to withhold such relief in a case where the State law provides no apparent machinery for review of the Federal ruling.

5. Is leaving a copy of a summons and complaint in the office of the manager of a hotel, at which a party is stopping temporarily, a mode of service authorized by Rule 4(d)(1) of the Federal Rules of Civil Procedure.

6. Where removal of a case was improper in the first instance, should the Federal Court's process and orders, with respect to a party over whom the state court had no jurisdiction prior to removal, be vacated at the time of remand.

Statement

This proceeding was instituted in the Court of Appeals to obtain a writ of mandamus directing the Honorable John W. Clancy, United States District Judge for the Southern District of New York, to vacate certain proceedings had before him relating to petitioner, or, in the alternative, to obtain a common law writ of certiorari to review those proceedings.

The action out of which this proceeding arose was commenced on or about February 21, 1951 in the Supreme Court of the State of New York, in and for the County of New York, by plaintiff, Mary Pickford, against defendant, Max M. Kravtez (5). The complaint sought to recover monies loaned to Kravetz in the sum of thirteen thousand four hundred and forty-nine dollars and ninety cents ($13,449.90) (6). On or about March 19, 1951, the defendant Kravetz interposed an answer asserting counterclaims and cross claims against plaintiff Pickford and a number of third persons including petitioner (6). In his answer Kravetz sought to recover six hundred and sixteen thousand five hundred and fifty dollars and sixteen cents ($616,550.16)

for work, labor and services allegedly performed and as damages for an alleged conspiracy to injure him (6).

On or about May 15, 1951, third-party defendant United Artists Corporation, a Delaware corporation, caused the action to be removed to the United States District Court for the Southern District of New York, pursuant to 28 U. S. C. Section 1441, alleging diversity of citizenship and the existence of a separate cause of action with respect to it (6). The defendant Kravetz acquiesced in such removal, and no application was made to remand the action to the State Court until November, 1953—some two and one-half years after the date of the original removal (6).

At the time of the removal of the action to the Federal Court in May, 1951, no jurisdiction had been acquired by the New York Courts over petitioner, who was then a resident of the State of California, and no process had been served upon him (6). On or about September 12, 1952, after the action had been pending in the Federal Court for some sixteen months, a purported substituted service of Federal process was made upon the petitioner. That service was not made personally but was attempted to be effected by leaving a copy of the third-party summons and complaint with the manager of the Hotel Sherry-Netherland, in New York City, where the petitioner stopped for approximately ten days enroute from his home in California to Europe (6-7, 28-30, 34).

On October 10, 1952 petitioner applied in the District Court to quash and vacate the purported service of process. That motion came on to be heard on October 21, 1952 before the respondent Hon. John W. Clancy (7, 41-63). On November 10, 1952, Judge Clancy handed down an opinion holding the alleged service valid as having been made in compliance with the requirements of Rule 4(d)(1) of the Federal Rules of Civil Procedure (7, 18-22). That opinion (18-22) is reported in 17 Fed. Rules Serv., ¶4(d). 121. A

formal order denying the motion to quash was made and entered on November 20, 1952 (7, 23).

The order of November 20, 1952, was non-appealable and, at the time it was entered, no method existed for obtaining review thereof prior to trial of the action and the entry of a final judgment. Accordingly, petitioner interposed an answer in December of 1952, in which answer he alleged as an affirmative defense that service of process had never validly been made upon him and that the District Court had never acquired jurisdiction over his person (7).

On or about November 13, 1953, the defendant Kravetz made a motion to remand the action to the Supreme Court of New York on the ground that no separate or independent claim had been alleged against United Artists or any of the impleaded defendants and that the original removal to the Federal Court had been unauthorized and improper (7-8).

The motion to remand the action to the Supreme Court of the State of New York placed petitioner in this anomalous position: His opportunity to obtain appellate review of the order sustaining service would be entirely cut off by remand, for there could be no final judgment from which an appeal would lie to the Court of Appeals, and under New York law there was no apparent machinery for obtaining such review in the State Courts. Yet, the decision upholding service was believed to be incorrect and had been the subject of published criticism. See N. Y. L. J., July 22, 1953, p. 122. The anomaly was heightened by the fact that the process and the order sustaining it were the acts of a Court which concededly never acquired valid jurisdiction over the action. Accordingly, the effect of remand would be that petitioner would be brought in as a party in the State Court, without recourse to an appellate tribunal, purely as the result of the improper issuance of Federal process and an erroneous Federal ruling

sustaining the service thereof, notwithstanding that no basis for Federal jurisdiction ever existed.

The petitioner thereupon made a cross-motion, based upon the conceded impropriety of the original removal, requesting Judge Clancy to vacate the order of November 20, 1952, which had denied petitioner's motion to quash the purported service of process, and to declare that all proceedings in the action since its removal to the Federal Court were without binding effect upon the petitioner (8-9, 66-71).

On January 12, 1954 Judge Clancy handed down an opinion granting the motion to remand and denying the cross-motion of petitioner (9, 24). The opinion (24) is unreported. In effect, Judge Clancy ruled that upon remand of the action to the State Court petitioner would be deemed a party thereto, although the only process alleged to have been served upon him was that of the Federal Court which never acquired valid jurisdiction over the action. At the same time, the Court foreclosed the petitioner from obtaining, in the normal fashion, an appellate review on the merits of the order dated November 20, 1952, notwithstanding the doubt which existed as to its soundness.

While the remand itself was of course non-reviewable, petitioner desired to safeguard his legal rights with regard to the proceedings *prior to* remand. Accordingly, before the entry of any order upon Judge Clancy's decision (9), the petitioner applied to the United States Court of Appeals for the Second Circuit for a writ of mandamus directing Judge Clancy to vacate the order theretofore made by him, dated November 20, 1952, sustaining the service, and to declare all proceedings had in the action to be without force and effect insofar as they related to petitioner. The petitioner requested the Court of Appeals, in the alternative, to issue a common law writ of certiorari to review the order of November 20, 1952 and the proceedings below in respect thereto.

On February 11, 1954, the Court of Appeals denied the petition in a *per curiam* opinion which read as follows:

> "There is uncertainty as to our power to act in the premises; but we are clear that the state court of first instance or on appeal has full authority to settle the issue as to the validity of the service upon defendant Chaplin. See New York Civil Practice Act, § 237(a)(4); 17 Ann. Reports New York Judicial Counsel, 62, 63 (1951). That tribunal we believe is now the appropriate one for all adjudication in the premises." (92).

Since the decision of the Court of Appeals, the case has continued to repose in the Federal Courts under successive stays granted respectively by Judge Augustus Hand of the Court below (94) and Justice Jackson of this Court.*

Specifications of Errors to Be Urged

The Court of Appeals erred:

1. In failing to hold that it had jurisdiction to review the pre-remand proceedings in the District Court.

2. In failing to hold that its jurisdiction could appropriately be exercised through the medium of an extraordinary writ.

3. In holding that the District Court's ruling sustaining service would be clearly reviewable in the State Court.

4. In failing to hold that, in any event, it, and not the State Court, was the appropriate forum in which to review the questions of Federal law presented by the District Court's rulings.

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* While the reporter's preamble to the Court of Appeals' opinion recites that the action has been remanded (92), that refers only to Judge Clancy's opinion on the motion for remand.

5. In failing to hold that the Federal summons and complaint had been served in an illegal manner.

6. In failing to hold that, in any event, in view of the impropriety of the original removal, the issuance of Federal process and the making of the order sustaining it were voidable acts which should have been vacated.

7. In denying the petition for a writ of mandamus directing the District Judge to vacate the order sustaining service and to declare the proceedings had before him to be without force and effect insofar as they related to petitioner.

8. In denying the petition for a common law writ of certiorari to review the order sustaining service.

Reasons for Granting the Writ

1. Certiorari should be granted because this case presents an important question concerning the jurisdiction of the Courts of Appeals to review Federal proceedings in removed cases which are remanded prior to final judgment. The Court below, after expressing "uncertainty as to our power to act in the premises," declined to assume jurisdiction. It is submitted that the decision of the Court below is in conflict with the principles enunciated by this Court in *Waco* v. *U. S. Fidelity & Guaranty Co.*, 293 U. S. 140, in which this Court held that, although an order of remand cannot be upset, the Courts of Appeals should review all proceedings prior to the remand where such proceedings might have lingering prejudicial after-effects.

2. Certiorari is further warranted because this case presents an important question as to the propriety of refusing to exercise jurisdiction where the effect of the refusal is to shift to the State Courts the responsibility for the correction of clearly erroneous orders of a Federal District Court. An examination of the New York law indicates that

the New York Courts have no apparent machinery for such review. Yet the Court below declined to assume jurisdiction upon the theory that the New York State Court is the proper forum to review the decisions of a United States District Court. It is submitted that the Court of Appeals misconceived and distorted the relationship between the State and Federal Courts in thus relinquishing its responsibilities of review in favor of a State Court remedy which is at best dubious and highly speculative. In this respect also, the decision of the Court below conflicts with the principles enunciated by this Court in *Waco* v. *U. S. Fidelity & Guaranty Co.*, 293 U. S. 140.

3. Certiorari is further warranted because the District Court's ruling sustaining the service in the present case is at sharp variance with existing authority and constitutes a clear misinterpretation of the pertinent provisions of the Federal Rules of Civil Procedure. Other Federal Courts have uniformly agreed that those provisions contemplate that service be effected at the permanent residence of a party and upon a person who resides therein. *First National Bank* v. *Ingerton* (10th Cir.), 207 F. 2d 793; *Judson* v. *Judson* (D. D. C.), 9 F. R. D. 336; *Zuckerman* v. *McCulley* (E. D. Mo.), 7 F. R. D. 739; 2 *Moore, Federal Practice* (2d ed.), Par. 4.11, pp. 928-930. In the present case, the purported service was made neither at the petitioner's permanent residence nor upon a person residing therein.

4. Certiorari is further warranted because, in refusing to vacate and set aside its proceedings insofar as they relate to petitioner, the District Court violated well established and fundamental concepts of the nature of removal jurisdiction. It has long been established that, where removal is improper in the first instance, then, upon motion to remand, all proceedings had in the Federal Court will be vacated and set aside. The leading case on the subject is this Court's decision in *Ayres* v. *Wiswall,* 112 U. S. 187,

with which the District Court's ruling in the present case is in conflict.

5. Certiorari should be granted now, prior to final judgment, because this will constitute the only opportunity for this Court to resolve the expressed uncertainty of the Court of Appeals as to its authority to act in the premises. Likewise, this may constitute the last opportunity for any Federal review of Judge Clancy's erroneous rulings. Should the responsibility of reviewing the Federal District Court's decision be left to the State Court, the latter may decide that it lacks the power so to do as a matter of State law.* Such a decision on non-Federal grounds would result in foreclosing a later review by this Court.

ARGUMENT

POINT I

The Court of Appeals had power to review the District Court's rulings.

The power of the Courts of Appeals to review pre-remand proceedings in the District Courts, as distinguished from the remand itself, was affirmed by this Court in *Waco* v. *U. S. Fidelity & Guaranty Co.*, 293 U. S. 140.

In the *Waco* case, an action instituted in a State Court had been removed to the District Court by a non-resident third party defendant on the basis of diverse citizenship and the existence of a separable controversy. The plaintiff moved for remand of the entire action or, in the alternative, for dismissal as against the third party defendant on the ground of improper joinder and remand of the balance of the case. Denying the first alternative, the District Court granted the second, ordering that the third party defendant

* See Point II, *infra*, pp. 13-15.

be dismissed from the case and that the balance of the action be remanded to the State Court. The basis for this disposition was a holding that the original removal had been proper, but that the dismissal as against the third party defendant had the effect of destroying diversity jurisdiction.

Recognizing that the remand itself was non-reviewable, the defendant requested the Circuit Court of Appeals to entertain an appeal from the dismissal as against the third party defendant. The Circuit Court declined to do so on the ground that the non-reviewable remand could not be disturbed even if the dismissal was erroneous.

Although agreeing that the remand could not be disturbed even if the dismissal was erroneous, this Court reversed and held that the Circuit Court was nevertheless required to review the dismissal. One of its effects, this Court pointed out, would be that the third party defendant would no longer be a party to the action after its remand to the State Court. Accordingly, if the order of dismissal was erroneous, the defendant would be unfairly prejudiced by its lingering after-effects in the subsequent proceedings in the case, and was therefore entitled to have the propriety of the order of dismissal reviewed independently of, and notwithstanding, the remand (293 U. S. at p. 143).

Just as the *Waco* case was a situation in which a third party defendant had been eliminated from an action as a result of an erroneous decision of the District Court, the instant case presents a factual situation in which a third party defendant has been brought into the action as a result of the wrongful decision of the District Court. As in the *Waco* case, the District Court's rulings, if erroneous, will unfairly prejudice the petitioner in the subsequent proceedings in the case. It is submitted that, under the principles of the *Waco* decision, those rulings are subject to review by the Court of Appeals.

It may be observed that the present case is distinguishable from the *Waco* case in that here the removal was improper from the outset, while in the *Waco* case the District Court was exercising a valid jurisdiction at the time of the order sought to be reviewed. This distinction suggests that whereas, in the *Waco* case, this Court directed that the order below be reviewed on the merits, here the District Court's acts should be vacated.*

Whichever disposition is appropriate, the *Waco* decision is clear authority for the proposition that remand does not terminate the appellate jurisdiction of the Courts of Appeals to review proceedings taken in the District Court prior to remand. (See also *Moore, Commentary on the 1949 U. S. Judicial Code* 285.)

POINT II

The Court of Appeals erred in declining to review the District Court's rulings by means of an extraordinary writ.

Under the *Waco* decision, as we have seen, remand does not deprive a Court of Appeals of appellate jurisdiction with respect to proceedings previously taken in the District Court. It is submitted that, in the present case, the Court of Appeals erred in declining to exercise that jurisdiction through the medium of an appropriate extraordinary writ.

The principles governing the suitability of employing extraordinary writs have been enunciated on a number of occasions by this Court. Those opinions have emphasized that the availability of the writs is to be determined not so much by technical and formal criteria as by considerations similar to those which govern the availability of equitable relief generally. *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, 25-26; *Ex parte Peru,* 318 U. S. 578, 584; *McClellan* v. *Carland,* 217 U. S. 268; *Bankers Life and Casualty Co.*

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* See Point II, *infra,* pp. 19-21.

v. *Holland,* 346 U. S. 379. Among the circumstances referred to as relevant to the propriety of issuing a writ are (a) the inadequacy of any remedy by way of appeal, (b) the clearly erroneous character of the ruling below, and (c) the jurisdictional nature of the question presented.

It is submitted that all those elements are present in the instant case.

A. No Adequate Remedy Exists by Way of Appeal.

As already noted, the orders sought to be reviewed here would ordinarily be reviewed on appeal from final judgment. The imminence of remand, however, makes it clear that that machinery will not become available in this case. Accordingly, an extraordinary writ constitutes the only method by which the Court of Appeals can exercise its appellate jurisdiction in the premises.

In denying the petition in the face of this situation, the Court of Appeals took the view that an adequate remedy existed by way of appeal in the State Courts. It is submitted that the denial of the petition on that ground was erroneous for two reasons: first, because examination of the pertinent state law reveals that there is no apparent machinery for such review; second, because review of Federal orders by a state tribunal is, in any event, an inappropriate, inadequate and an improper remedy.

With regard to the first reason, we observe that it has long been the law of New York that objections as to personal jurisdiction cannot be considered once there has been a general appearance in the action. In other words, notwithstanding any attempt to preserve the question by way of affirmative defense, the filing of an answer has been held to waive the objection. *Henderson* v. *Henderson,* 247 N. Y. 428. As already noted, an answer was filed by petitioner following the entry of the order denying the

motion to quash service. This was necessitated by the fact that, under the Federal practice, no appeal could be taken from that order.

The Court of Appeals based its belief that review would nevertheless be available in the State Courts upon the recent addition of a new Section 237-a to the New York Civil Practice Act. That section, insofar as pertinent, provides as follows:

> 237-a. "*Defendant's special appearance.*
>
> 1. Except as otherwise provided in subdivision two, a defendant may make a special appearance solely to object to the court's jurisdiction over his person. Such objection whether based on the ground that process or its service is insufficient or that the defendant is a person not subject to the jurisdiction of the court, may be raised by a motion to set aside the service of process or to strike out part of the complaint, as may be appropriate. The objection, if raised in a manner other than that provided in this section or if combined with an objection to the merits, except as otherwise provided in subdivision four, shall be deemed waived. * * *
>
> 4. After a motion made pursuant to this section has been denied, the defendant may litigate the action on the merits without being deemed to have waived his objection to the court's jurisdiction over his person."

Perusal of that provision discloses that it makes a narrow exception to the general rule heretofore prevailing in New York. That exception is for cases in which a motion to set aside service has been made "pursuant to this section" before any contest on the merits. However, it is not at all clear that the exception is broad enough to include a case like the present one, where the only challenge to the

Court's jurisdiction prior to answer was made not under the provisions of Section 237-a of the New York Statute, but under the Federal Rules of Civil Procedure.

In addition to the foregoing features of State law, a substantial question exists as to whether, as a matter of Federal law, review of Federal rulings is within the power of a State Court. It cannot be denied that, following removal, the case was in the Federal Court. The law may be that, after remand, a State Court has no power to affect orders made under the paramount authority of the United States Courts in a period during which a case was under their control. If this be true, then the failure of the Court of Appeals to take action will mean that, as a matter of Federal law, petitioner can obtain no later review of Judge Clancy's rulings.*

B. The District Court's Order Denying the Motion to Quash Service Was Clearly Erroneous.

Rule 4(d)(1) of the Rules of Civil Procedure provides, in part, that service of a summons and complaint may be effected upon a party by

> "* * * leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein * * *."

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* We note that this view of the law suggests that the order sustaining service in the present case might well be regarded as final, inasmuch as the elimination of the possibility of a Federal judgment has transformed it into "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it". *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 545-547; *U. S.* v. *Cefaratti*, D. C. Cir., 202 F. 2d 13, cert. den. 345 U. S. 907. In the last cited case, a normally interlocutory order granting a motion to suppress certain evidence in a criminal prosecution was regarded as final because the Government would have no right of appeal in the event of an acquittal.

In the present case, service under that rule was purported to be made by leaving a copy of the summons and complaint in the office of the manager of a hotel at which petitioner was stopping for a few days pending his departure on a trip to Europe (28-30, 34). At the time, petitioner was a domiciliary of California and maintained a permanent residence in that state (29-30). The manager resided not at the hotel but in Bayshore, Long Island, N. Y. (41, 48).

It is submitted that the purported service was clearly outside the letter and spirit of Rule 4(d)(1), both with respect to the requirement that it be at petitioner's "dwelling house or place of usual abode", and with respect to the requirement that the papers be left with "a person of suitable age and discretion then residing therein."

Insofar as the first requirement is concerned, the rule clearly contemplates a place at which the party resides with some regularity or permanence, and has been uniformly so understood in previous decisions. *First National Bank* v. *Ingerton* (10th Cir.) 207 F. 2d 793; *Blane* v. *Young* (N. D., Ohio), 10 F. R. D. 109; *Leigh* v. *Lynton* (E. D., N. Y.), 9 F. R. D. 28; *Hancock Ins. Co.* v. *Gooley,* 196 Wash. 357.

In *First National Bank* v. *Ingerton, supra,* 207 F. 2d 793, service was attempted to be effected by leaving a copy of the summons and complaint with the defendant's son, at a private house which the defendant and her son had been sharing during a summer stay of approximately three weeks. As in the present case, the defendant maintained a permanent residence elsewhere. Holding that the permanent residence and not the temporary one was the proper place for substituted service under Rule 4(d)(1), the Court of Appeals for the Tenth Circuit, construing the previous authorities on the subject, stated (at p. 294):

> "We see no conflict in principle in the federal cases which have construed this provision. They all

recognize that the word 'usual' has significance and must be given consideration in determining the validity of such service."

In the present case, the District Judge, in order to sustain service, took the term "dwelling house" out of context, and then, substituting his own term, "dwelling place", held that it did not connote any requirement of permanence or regularity (19). It is submitted that such reasoning was clearly unsound and that the Court took undue liberties with the language of the rule.

It is equally clear that the manager cannot be regarded as a person "residing" in the petitioner's dwelling house or place of usual abode.

The boundaries of any "dwelling house" or "place of abode" are the particular suite of rooms, apartment, or private house in which the party actually resides. *Judson* v. *Judson* (D. D. C.), 8 F. R. D. 336. In the instant case the summons and complaint were not left at the petitioner's suite, nor was the hotel manager a person residing in that suite.

In *Judson* v. *Judson, supra,* 8 F. R. D. 336, service was attempted to be effected by leaving a copy of the summons and complaint with the manager of an apartment-hotel. Notwithstanding the fact that, in that case, the manager lived in the hotel, the Court quashed the service, expressly holding that service upon a resident of the building was not enough.

In the present case the manager did not come within the rule for the additional reason that he could not even be regarded as residing at the hotel, for the undisputed evidence established that he lived on Long Island (41, 48).

The District Judge sought to find residence in the fact that the manager worked at the hotel and spent the better

part of each day there. It is submitted that this did not constitute residence within the spirit or letter of the rule, and that employment at a place does not constitute residence therein.

In *Zuckerman* v. *McCulley* (E. D. Mo.), 7 F. R. D. 739, the fact that the recipient of the papers was the janitor was held insufficient to constitute him a resident. Likewise, in 2 *Moore, Federal Practice,* at p. 930, it is stated that the rule "would seem to exclude a person, such as a servant, who works in the master's house, but resides elsewhere".

It is submitted that the District Judge's decision sustaining the service here violated the underlying concept of Rule 4(d)(1). That rule is plainly designed to provide for a situation where the likelihood that the party will receive notice of the service arises from the fact that process is left at a place of more or less permanent residence with a member of his household or family group with whom he is likely to be in more or less familiar and frequent contact. Manifestly, leaving a summons in the office of a hotel manager does not even remotely resemble such a service.

In the course of his opinion denying the motion to quash, Judge Clancy indicated that his decision was influenced by his belief that petitioner had received actual notice of the service (20-1). However, the record is barren of any legal evidence of the receipt of such notice—the summons and complaint having actually been returned by the hotel manager to the attorney for Kravetz (35, 44-6)—and Judge Clancy acknowledged in his opinion that his belief as to notice was nothing more than an inference drawn from the manner in which the hotel manager had sought to protect petitioner's legal rights (20). It is submitted that the Federal Rules constitute a legislative determination of the circumstances under which it is per-

missible to infer notice, and that Judge Clancy was in error in substituting his own standards for those established by Congress. *Zuckerman* v. *McCulley, supra,* 7 F. R. D. 739; *U. S.* v. *Waverly Club* (S. D. N. Y. 1927) 22 F. 2d 422; 2 *Moore, Federal Practice* (2d ed.) ¶ 4.11, p. 928.

In short, the present case constitutes an instance in which the District Judge, influenced by his belief that actual notice had been received, pushed aside the requirements of the Rules of Civil Procedure. While it is true that Rule 4(d)(1) should be construed liberally so as to provide "a good deal of flexibility and freedom in service" [see *Rovinski* v. *Rowe* (6th Cir.), 131 F. 2d 687, 689], this does not mean that its requirements may be disregarded or its basic concepts ignored [See *Leigh* v. *Lynton, supra,* 9 F. R. D. 28; *Blane* v. *Young, supra,* 10 F. R. D. 109, 110; *Zuckerman* v. *McCulley, supra,* 7 F. R. D. 739]. It is submitted that the District Judge erred in substituting his own standards for those established by the Rule.

C. The Denial of Petitioner's Cross-Motion to Set Aside the Federal Process and the Order Sustaining Service Was Clearly Erroneous.

Since the removal of the action to the Federal Court was improper in the first instance, the acts of the Federal Court were the acts of a tribunal whose acquisition of control over the action was without basis. Accordingly, those acts were voidable and, on the motion for remand, when the impropriety of the original removal was called to the Court's attention, it was the duty of the Court to set aside the proceedings which it had taken under a mistaken notion as to its power.

That this was the proper course is clear in the light of this Court's decision in *Ayres* v. *Wiswall,* 112 U. S. 187, which involved an improperly removed action to foreclose a mortgage. In that case, a decree had been rendered fixing the amount of the obligation and ordering the sale of the

property before the impropriety of the removal was discovered. Granting a motion for remand, the Trial Court recognized its obligation to restore the case to its status as of the date of the removal and included in its order a provision to the effect that all Federal proceedings in the case were "set aside and held for naught" (*id.*, at p. 190). On appeal, that order was affirmed in all respects by this Court (*id.*, at p. 193).

In denying petitioner's cross-motion below, the District Court sought to distinguish the *Ayres* decision by interpreting it as having vacated only the final decree and not the rest of the proceedings. That interpretation was based upon language in the opinion to the effect that the State Court might make whatever use as might be deemed desirable of the Federal "pleadings filed and testimony taken" (*id.*, at p. 190). However, Judge Clancy failed to take into account certain other language on the jurisdictional point, concerning which this Court emphatically declared that any Federal proceeding in a case improperly removed from the State Court could not "of itself confer jurisdiction if there had been none before" (*id.*, at p. 190).

It is submitted that the District Judge misinterpreted the *Ayres* decision. The language upon which he relied means only that where a cause of action is improperly removed from the State Court, then, on remand back, although the interim acts of the Federal Court must be vacated, the State Court can determine what use is to be made to the acts of the *parties*, such as pleadings, testimony, and the like. *Brown* v. *Fletcher* (2d Cir.), 206 Fed. 461, 465. This pertains to the acts of only those parties over whom the State Court validly obtained jurisdiction in the first instance through proper State Court process. However, the acts of the *Court* must be vacated, and this is particularly true of acts which amounted to an assertion of jurisdiction.

In the present case, the District Court, since it had no jurisdiction over the subject matter of the action, did not acquire valid jurisdiction over the person of petitioner, and should not be permitted to transfer to a State Court the fruits of a power which it never rightfully possessed.

D. The District Court's Errors Were Jurisdictional.

While the common-law writs may be used to review non-jurisdictional as well as jurisdictional errors where the circumstances are extraordinary [*McCullough* v. *Cosgrave*, 309 U. S. 634; *Los Angeles Brush Co.* v. *James*, 272 U. S. 701; *cf. Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 388 (dissenting opinion)], such relief appears to have been most readily available when the claimed error was of the latter type. It is submitted that, while the clarity of the error in the present case, together with the inadequacy of any remedy by way of appeal, suffice to warrant the issuance of an extraordinary writ, such relief is further merited by the fact that the District Court's errors come within the jurisdictional category.

The ruling sustaining service constituted the basis for the District Court's exercise of jurisdiction over petitioner's person. If the service was improper, then the District Court did not rightfully have such jurisdiction. Manifestly, then, the District Court should not be permitted to convey any such wrongful jurisdiction to the State Court, and an extraordinary writ is an appropriate means for preventing that eventuality.

In addition, the later denial of the cross-motion to vacate, apart from its bearing on the Court's jurisdiction over petitioner's person, presents a substantial question as to its jurisdiction over the subject matter. If the original removal was improper, then the District Court never acquired any rightful jurisdiction over the subject matter of the action, and its acts should be set aside at the time of

remand. The refusal of the District Court to make an order to that effect constitutes an attempt to exercise an unwarranted control over the subsequent course of the action. Unless relief is granted through the medium of an extraordinary writ, the net effect of the improper removal will have been an unjustifiable enlargement of the rights of respondent at the expense of the rights of petitioner.

In short, the instant case presents a situation in which erroneous rulings as to peculiarly Federal matters were made by a District Court in an improperly removed case. By these rulings, the District Court assumed a wrongful jurisdiction which it now proposes to convey to the State Court. The remedy of appeal is hopelessly inadequate in the premises. These circumstances are sufficient, we submit, to require the Court of Appeals to take appropriate action to correct the District Courts prejudicial error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MYLES J. LANE,
Counsel for Petitioner.

HERBERT P. JACOBY,
STUART G. SCHWARTZ,
of Counsel.

APPENDIX A

Rule 4(d) Rules of Civil Procedure—

(d) Summons: Personal Service. * * * Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

28 U. S. C. § 1651—

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

New York Civil Practice Act § 237-a—

237-a. *"Defendant's special appearance.*

1. Except as otherwise provided in subdivision two, a defendant may make a special appearance solely to object to the court's jurisdiction over his person. Such objection whether based on the ground that process or its service is insufficient or that the defendant is a person not subject to the jurisdiction of the court, may be raised by a motion to set aside the service of process or to strike out part of the complaint, as may be appropriate. The objection, if raised in a manner other than that provided in this section or if combined with an objection to the merits, except as otherwise provided in subdivision four, shall be deemed waived. * * *

4. After a motion made pursuant to this section has been denied, the defendant may litigate the action on the merits without being deemed to have waived his objection to the court's jurisdiction over his person."

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BRIEF OF DEFENDANT-RESPONDENT, KRAVETZ, IN OPPOSITION TO PETITION FOR CERTIORARI*

Statement

Respondent, Kravetz, opposes the petition of the third-party defendant, Charles Chaplin (hereinafter sometimes referred to as "Chaplin") for certiorari to the Court of Appeals for the Second Circuit, touching its order denying Chaplin's application for mandamus, or, in the alternative, for certiorari.

Chaplin (as appears from his petition, R. pp. 4-17) sought, in the Court of Appeals, by either route, to accomplish a reversal of that *part* of a remand order (R. pp. 64, 66) about to be made by Judge Clancy of the United States District Court for the Southern District of New York, which denied Chaplin's cross-motion, responsive to respondent Kravetz's said remand motion, to vacate another and prior order of Judge Clancy. Said prior order had denied a prior motion of Chaplin (as defendant) to quash service of process, accomplished on him, in the District Court, after the cause had been removed.

Removal of the cause from the New York Supreme Court was accomplished on petition of the third-party defendant, United Artists Corporation (a Delaware corporation), upon the alleged ground that, as between itself and defendant-third-party plaintiff, Kravetz (a resident of California, now deceased), there was a separate and independent controversy. In fact, there was only an asserted joint liability of said United Artists Corporation with its third-party co-defendants.

Up to the time of service of federal process upon him, and for sixteen months, Chaplin had remained in California. It was only after removal of the cause that he was found and served with process in the Southern District of New York, while he sojourned, with his wife and four children, and members of his staff, at a hotel there (R. pp. 29-30, 32, 42, 45), before proceeding to permanent residence in

* References to Record are "R. p. "; to Petitioner's Brief, "p. ". Italics, unless otherwise indicated, are ours.

Switzerland, from which sanctuary he now directs his forces (R. p. 70).

Chaplin's statement of the facts omits to recite that at the time of service of process, Chaplin had no dwelling or usual place of abode in California, for, as later events showed, he was on his way out of the country forever (R. pp. 70, 29, 55). Both Chaplin's attorney and his friend, Kelley, in their affidavits, were careful to say only that Chaplin "has been" a resident of California (R. pp. 29, 33). This, though the attorney, who presumably drafted all the papers, knew how to differentiate between "has been" and "is", for he denied that the New York hotel "is" Chaplin's dwelling place. In his testimony, Kelley went no further than to say, what was in effect only hearsay information, that he (Chaplin) "has a home in California"—a statement consistent with the possibility of his having homes elsewhere, as, for instance, in New York City (R. p. 54). Chaplin himself did not testify, either in person, by affidavit, or by deposition, though he had and took ample time (a month) to make his motion (R. pp. 6-7). Only Chaplin's counsel, in the brief here submitted, has screwed up his courage to the point of saying that Chaplin had a "permanent residence" in California (p. 9)—as to which the proof is to the contrary.

Upon service of the District Court process, Chaplin, through his counsel—he having already left the country—moved to vacate the service (R. p. 26), which motion was denied after testimony of his witnesses had been heard and all the issues of fact resolved against him. There was no question but that, with full knowledge of the action, he had evaded service, and that notice of the service had reached him. We do not further elaborate upon the testimony, because the merits of the decision are not here material. The opinion of Judge Clancy states his findings (R. p. 18).

While the issue is not here—because, contrary to petitioner's basic misapprehension, a review of the weight or legal effect of the evidence is not relevant to the present inquiry—it is interesting to observe that *First National Bank & Trust Co.* v. *Ingerton* [C. A. 10] 207 F.

2nd 793, cited by Chaplin (pp. 9, 16), was decided by a divided court—divided "on a question of fact"—the majority affirming an order quashing service of process, only because it was unable to "say that the trial court erred" (p. 795) in appraising the facts. In the case at bar, on the other hand, resolution of an issue of fact was made in favor of validity of the service of process. Chaplin was on his way out of the country *forever,* and, if his New York hotel was not his abode, he had none at all!

Following the denial of his motion to vacate service of process upon him, Chaplin filed an answer, and participated in the taking of depositions (R. p. 70), and, acquired standing, had he so chosen, himself to move to remand the cause (U.S.C.A., § 1448). He never questioned the jurisdiction of the District Court. When respondent Kravets moved to remand, Chaplin made his cross-motion asking "that upon granting said motion to remand this action", the court vacate the order denying his (Chaplin's) prior motion to quash service upon him, and "declare such alleged service to have been null and void." This, upon the sole stated ground that the District Court lacked jurisdiction to act at all, though the reason so urged was utilized as a pretext for the real attack, which was on the alleged error of Judge Clancy's order denying the motion to quash service (R. pp. 64-69).

Chaplin did not oppose the motion to remand—to which there could be no opposition (*American Fire & Cas. Co.* v. *Finn,* 341 U. S. 6). Petitioner's footnote (p. 15), weakly suggesting—contrary to his own petition (R. p. 7)—that, according to *Cohen* v. *Beneficial Loan Corp.* (337 U. S. 541), the order is appealable, proves too much. For, if the order sustaining service is to be deemed sufficiently final to permit of appeal therefrom, then, certainly, no writ should be allowed (*Cohen* case, *supra,* and, also, *Stack* v. *Boyle,* 342 U. S. 1). And, in the face of remand, no appeal may be considered either. This, without further inquiry into the settled policy, both under federal and State rules, that an issue as to service of process is of the kind which is appropriately considered on a review of a final judgment in the case (*Cohen* and *Stack* cases, *supra*).

The prior interlocutory order denying Chaplin's motion to quash said service was, of course, not appealable.

Chaplin's cross-motion having been denied (R. p. 24), and the order in that respect—because it was interlocutory, and, also, because it was a *part* of the remand disposition—being also unappealable, he sought, by mandamus or certiorari, which he asked should be issued by the Court of Appeals, to obtain a review "otherwise" (cf. U.S.C.A., §1447[d]), while, through one device or another (*infra,* p. 7), he prevented the entry of the remand order.

Questions Presented

It is important correctly to gauge the precise and only questions involved in Chaplin's application to this court, for certiorari.*

The fundamental issue is not whether Judge Clancy's denial of Chaplin's motion to quash, was right. None of the writs may be used to supply an appeal from an interlocutory order, where the Congress has said there shall be no appeal from such an interlocutory order; nor would the grant of any writ *for such a purpose,* be auxiliary to the appellate jurisdiction of the Court of Appeals or of this court. Instead, the granting of a writ would by indirection, afford Chaplin an appeal where, by statute, it was intended—and so directed—that there be none. This court, and the Courts of Appeals, have often refused to tolerate any such indirection (*Gay* v. *Ruff,* 292 U. S. 25, 29;

* Except as we do so in our Point V (*infra,* p. 26), we argue in opposition to the petition for certiorari, irrespective of the fact that an order of remand was signed by Judge Clancy, was entered by the Clerk of the District Court, and was subsequently attempted to be vacated. The facts touching thereon—of which we think the court should be apprised—are presented in our motion to supplement the record, handed up concurrently herewith. Copies of the material portions of the District Court's record, are, for the convenience of the Court, annexed to said motion papers as an exhibit. Our observations on this aspect of the matter will be found at page 26, *infra.*

Kloeb v. *Armour & Co.*, 311 U. S. 199, 204; *Borden Co.* v. *Zumwalt* [C. A. 9], 120 F. 2nd 69; *Atchison T. & S. F. Ry. Co.* v. *Smith* [C. A. 9], 47 F. 2nd 223; *Chicago, St. P. M. & O. Ry. Co.* v. *Hensley* [C. A. 8], 25 F. 2nd 861; *Natl. Farmers Bank, etc.* v. *Moulton* [C. A. 8], 32 F. 2nd 78).

Furthermore, if Chaplin's purpose be to test whether service upon him was valid according to Federal rules, the grant of certiorari by this court would be a futile act. For by such a writ, this court would be reviewing, not the merits of the prior order denying Chaplin's motion to quash federal service upon him, but only whether the District Court had power to issue its process, and power to entertain a motion and to decide whether such power existed. As to the District Court's power to issue process, and to decide the application of its own power, the statute is clear enough (U.S.C.A., §§ 1447, 1448). The issue is not that, but whether, on remand, all that went before, would be deemed void, when called in question in the State court, so that the District Court, as a prophylactic measure, should now prescribe what the State court may or may not hereafter do. Even if this court's decision were that, by relation back, the District Court—when it denied the prior motion to quash service of process—acted without jurisdiction, and that, therefore, its order denying the motion was void, the issue as to whether federal process issued in accordance with federal rules, was validly served upon Chaplin, would still, on its merits, be undetermined. We do not anticipate that this court, in the very act of declaring that all that had happened between removal and remand was void, would at the same time exercise a void jurisdiction to characterize the legal effect of the District Court's interim and still interlocutory, and therefore, non-final dispositions, and thus transgress the Congressional mandate, that there shall not be any "review by appeal or otherwise". On the contrary, we should expect the same disposition which this court made in *General Investment Co.* v. *Lake Shore Ry. Co.* (260 U. S. 261), with respect to the federal court's function in reappraising the denial of a motion to quash

service, made, before removal, in the State court:

> "The State court's ruling was purely interlocutory, and its status in this regard was not affected by the removal. Being interlocutory, it was subject to reconsideration, and would continue to be so up to the passing of a final decree. Had the cause remained in the State court, the power to reconsider would have been in that court; but when the removal was made, the power passed with the cause to the district court." (p. 267)

Furthermore, since all that there can be in issue, for the future, is whether the service of process made in the federal court, was accomplished in such manner as to invite respect by the State court, and to what extent the State court may choose to enforce it as valid, it follows that only if, as and when that issue should be determined by the State courts, *adversely* to Chaplin, would he be in a position to ask this court, by certiorari touching the State court's final judgment, to review the *merits* of his claim that federal service of process upon him was not validly made, in accordance with federal rules.

The decisive issue is, therefore, as to whether the District Court, when it granted remand, should also, as part of one and the same order, have vacated its prior order denying Chaplin's motion to quash service upon him—an issue touching the scope and operation of the remand order, as to which issue there may not be any review. Such issue is not different from what it would have been if the District Court had quashed service, and this respondent, on remand, had asked to vacate the order so accomplishing. Thus, it is the *result* of the court's order, rather than the power to make it, which Chaplin challenges.

It was to change the result—*i.e.,* to have the remand order contain an explicit nullification of the prior order, because it had *denied* his motion to quash—that Chaplin made his cross-motion to respondent Kravetz's motion to remand, and, upon the denial of that cross-motion, asked the Court of Appeals for mandamus, and, when that court denied relief, procured, as incident to the application for mandamus, successive stays pending determination of the present application for certiorari.

But stays of what? Clearly, notwithstanding the diplomatic phraseology employed in the stay orders, the stays were of any entry of the *order of remand* which the District Court was about to make, so that an interlocutory order—which had denied a prior motion to quash service, and from which there never was any right to appeal—though it could not be directly reviewed, might nevertheless be indirectly reviewed, and in form vacated for alleged lack of any jurisdiction of the District Court to entertain any motion to quash service of process.

Chaplin has thus far successfully evaded and obstructed operation of the Congressional mandate against review by "appeal or otherwise":

(1) by an *ex parte* request, made by letter to the District Judge, to withhold signing of his order of remand, with which request the District Judge apparently complied out of a proper respect for the Court of Appeals, which had under consideration Chaplin's application for mandamus or certiorari;

(2) by another *ex parte* application, resulting in a stay granted by Judge Augustus N. Hand, which stay the District Judge unwittingly disregarded, when he nevertheless signed a remand order, which was duly entered, and then—once he was informed that such a stay was outstanding—purported, we think, ineffectively, to revoke said remand order (See pp. 26-30, *infra*).

(3) by continuance of such stay, pending disposition of the petition for certiorari now before this court.

All of this, notwithstanding settled law to the contrary!

Accordingly, contrary to the questions posed in Chaplin's brief, the inquiries material to Chaplin's present application for certiorari are rather these:

1. Is it an appropriate exercise of federal jurisdiction—

(a) notwithstanding the Congressional mandate that there may not be an appeal from a mere interlocutory order (which denied a motion to quash service of process on Chaplin), and

(b) notwithstanding the Congressional mandate that an order of remand and, by the same standard, any part, incident or consequence thereof, shall not be reviewed by an appeal from such order of remand, or "otherwise", and

(c) notwithstanding that any vacatur of the prior order would not determine that the federal service of process, judged by federal rules, was void or valid,

nevertheless, indefinitely to project federal control of the case, and, to that end, indefinitely to stay the entry of a remand order, so that this court may review the issue as to whether the District Court—in the light of a subsequent and imminent remand of the entire case—had power to issue its process, and whether its service conformed with federal rules, and to entertain a motion to quash service of process, and decide the motion either way?

2. *If so,* did the District Court, when it decided the prior motion to quash, have jurisdiction to entertain, and either to grant or deny Chaplin's motion to quash service?

3. In any event, is not the petition premature? Should it not await final judgment in the State court, and one which is adverse to Chaplin?

Underlying Chaplin's entire argument—whether in his formulation of "Questions presented" (p. 2), or in his "Reasons for granting the writ" (p. 8), or in the development of subsidiary propositions throughout his brief—there is the fundamental inconsistency between the admission that respondent Kravetz is "entitled to the order of remand" (R. pp. 66, 68), and the realization that the "successive stays" which Chaplin has procured (p. 7) have obstructed the entry of the remand order. All under the pretext that "Petitioner does not seek to review any order of remand", but to have "appropriate steps taken • • • with respect to proceedings taken prior to remand" (R. p. 10), *i.e.,* to amend the order effectuating remand, so that it will vacate interlocutory proceedings! Of course, such an effort touches the remand order itself, and would "review" it, "by appeal or otherwise" (U.S.C.A., § 1447[d]). Otherwise, there would not be any necessity for staying the remand order.

The Disposition by the Court of Appeals

The Court of Appeals, as its opinion shows, answered the first question in the negative, and, therefore, never

reached the second and third. It assigned as its reasons:

(1) a doubt as to whether it had any power to entertain a prayer for any writ;

(2) a conviction that whatever relief Chaplin might ask, was available to him in the New York courts; and, therefore, in the exercise of its discretion, refused to exercise power, if it had it; and

(3) a ruling that, as a matter of law, it was only in the New York courts that any and all adjudication must now be made.

In so disposing of the matter, in the exercise of its discretion, the Court of Appeals followed the rule formulated by this court, in *Ex Parte Bakelite Corp.* (279 U. S. 438), in which this court said:

> "But the doubt need not be resolved now, for, assuming that the power exists, there is here, as will appear later on, no tenable basis for exercising it. In such a case, it is admissible, and is common practice, to pass the question of power and to deny the writ because without warrant in other respects." (pp. 448-449)

To the same effect: *Re Muir* (254 U. S. 522, 533); *Re Hussein Lufti Bey* (256 U. S. 616).

It will appear from our presentation that, not only was the denial of the writ justified, in the exercise of discretion, but that the doubt expressed, as to jurisdiction to entertain an application for mandamus, should well have been resolved in the negative.

POINT I

Since neither an order of remand, nor any part thereof, is in any event reviewable "by appeal or otherwise", and since Chaplin's real grievance is that a different decision should have been made of his prior motion to quash service of process made upon him, which different disposition he would have the District Court reflect as a part of the remand order, neither mandamus nor certiorari is auxiliary to the forbidden appellate jurisdiction, and, accordingly neither writ is an appropriate remedy.

It is well-settled that there may not be any appeal from an order of remand (*Metropolitan Casualty Co.* v. *Stevens,*

312 U. S. 563). The statute explicity so provides:

"An order remanding a case to the State court from which it was removed is not reviewable on appeal *or otherwise.*" (U.S.C.A., Title 28, § 1447[d])

So it was held in *Roche* v. *Evaporated Milk Assn.* (319 U. S. 21) that a Court of Appeals is not authorized to issue a writ of mandamus, except in aid of its own appellate jurisdiction. In view of the fact that no appeal from either of the orders made by Judge Clancy was or is authorized—there was no appeal to the Court of Appeals which could be the subject of protection. Dissatisfaction with the dispositions made does not present any question of jurisdiction. "* * * even if erroneous", there was "involved no abuse of judicial power * * *" (*Roche* case, p. 27; *cf.*, a similar ruling on diversity citizenship, incident to remand: *Polito* v. *Molasky* [C. A. 8], 123 F. 2nd 258, 261; cert. den. 315 U. S. 804).

Nor is it permissible for Chaplin, in his eagerness to accomplish an appeal from Judge Clancy's order denying his motion to quash service, to anticipate a remedy which he may invoke only should a judgment eventuate against him in the State court.

As was said in *Re Muir* (254 U. S. 522):

"The suit is still in the interlocutory stage. The court may take up again the question of its jurisdiction. If it does, the inquiry may proceed on other lines and the facts may be brought out more fully than before. In addition, the question may be reexamined in regular course on an appeal from the final decree." (p. 533-534)

It is both federal and New York policy to consider matters touching service of process, as a part of the review of the final judgment (F. R. C. P. 4; N. Y. Civ. Pr. Act, § 237a). "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy * * *" (*Roche* case, p. 30).

As this court, in the *Roche* case, pointed out, it was to avoid untold delay that "this court has consistently re-

fused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a cause to the State court from which it had been removed" (p. 30).

Yet, the record before this court shows, not only such delay, but indefinite stay of entry of the remand order itself, in violation of settled authority, as it was both prior to the last revision of the Judicial Code and as it is now. So this court, quoting from *In re Pennsylvania Co.* (137 U. S. 451, 454), in *Employers' Reinsurance Corp.* v. *Bryant* (299 U. S. 374), said that "the use of the words 'such remand shall be immediately carried into execution'", contained in the former statute, "is strongly indicative of an intent to suppress further prolongation of the controversy *by whatever process*" (p. 380). And in *United States* v. *Rice* (327 U. S. 742, 748-9), this court said that such phraseology was used "to make doubly certain" that there would be no delay, and continued:

> "Congress, by the adoption of these provisions, as thus construed, established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the District Court to which the cause is removed. This was accomplished by *denying any form of review* of an order of remand, and, before final judgment, of an order denying remand. In the former case, Congress has directed that upon the remand the litigation should *proceed* in the State court from which the cause was removed." (pp. 751-2)
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> • • •
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> "Statutory language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue or statutory purpose is otherwise obscure." (pp. 752-753)

Applying these standards, it is clear that any stay of entry of the remand order is wholly unauthorized.

It is no answer to these settled and fundamental principles that, as Chaplin asserts, had the case continued in

the District Court, and had it eventuated in an adjudication against him, he would, as an incident of an appeal from any such *adverse* final judgment, have had the opportunity to have the Court of Appeals review the propriety of the District Judge's order denying his motion to quash service. For:

1. The policy of the law is that there be no review of an interlocutory order, such as this, except after final judgment.

2. That there cannot be any federal final judgment at all—by reason of a supervening rule of public policy reflected in the remand of the cause—does not justify a review where it has been decreed that there should be none. There will be a State final judgment to which this court's certiorari may run.

3. There may not be any presumption—and Chaplin would be the last to urge one—that a federal final judgment would have been, or that the State final judgment will be, adverse to Chaplin.

4. Even had there been no motion to remand, there could never have been a review by the Court of Appeals, even after final judgment, because—*as is conceded*—the cause should never have been removed—an objection which would survive on appeal, even on the court's own motion (*American Fire & Cas. Co.* v. *Finn,* 341 U. S. 6). The remand of the cause was inescapable, and would have prevented any review of the interlocutory order.

5. The Congress having provided that there should be no appeal from a mere interlocutory order denying a motion to quash service, there may not be made available a substitute writ, either of mandamus or certiorari, thus "otherwise" affording an improvised appeal and thereby violating two mandates: (a) that there shall not be any review of this type of interlocutory order, and (b) that there shall not be any further exercise of jurisdiction, except to remand the case to the State court.

6. The right to appeal is statutory. There is no inherent right to an appeal. There may not be a grant of an equivalent method of review, in contravention of the mandate of Congress, any more than jurisdiction may be exercised when Congress has commanded it must be relinquished.

A federal judge should not be mandamused to purport to act with jurisdiction, as he recognizes (as petitioner

would have it) that he has none and, therefore—because he must—remands the case to the State court. It is no part of that surrender of authority to issue final instructions and elucidations to the succeeding State jurisdiction. (cf. *In Re Greenlie-Halliday Co.* [C. A. 2], 57 F. 2d 173.)

As was said in *Thompson* v. *Kelly* [C. A. 8] (170 F. 2nd 213), quoting from *Wabash Ry. Co.* v. *Woodrough* [C. A. 8] (29 F. 2d 832):

> "'* * * The order was one which the court was authorized to make. That action was final and conclusive, and is not open to review either directly or indirectly, either as to the exact question to be passed upon or *as to the result.* * * *'' (p. 214)

To the same effect: *Larsen* v. *Switzer* [C. A. 8], 183 F. 2nd 850; cert. den. 340 U. S. 911; *United States* v. *Fee* [C. A. 9], 138 F. 2d 158; *Mutual Life Ins. Co.* v. *Holly* [C. A. 7], 135 F. 2d 675; *Carr* v. *Donohoe* [C. A. 8], 201 F. 2d 426.

The issue is not different because it is the service of federal process which furnishes the occasion for controversy, nor can it be material that the order touching the validity of service of process, as here, denied a motion to quash service, instead of granting it. So, in *Employers Reinsurance Corp.* v. *Bryant* (299 U. S. 374), further process was issued out of the District Court, challenged and set aside (p. 376), and, thereupon, an order of remand made. A petition for mandamus to vacate the remanding order was denied.

Even were there a mooted question of jurisdiction—as there is not in this case—the result would be the same. So, in *Re Hussein Lufti Bey* (256 U. S. 616), the issue presented was one touching process and jurisdiction. This court said: "It is not plain that there is an absence of jurisdiction here * * *. We regard the situation as one in which to refuse the writ would be a proper exercise of discretion" (p. 619).

In the foregoing discussion, we have considered, for the most part, only the application for writ of mandamus. We need not dwell as long upon the request, in the alter-

native, for writ of certiorari. Such a writ, it is elementary, is not available except where there is no appeal possible, but where there is lacking any prohibition against any review. Obviously, where the policy of the Congress was to eliminate any review, by appeal or "otherwise", to grant a writ of certiorari as a substitute for an appeal, would be to violate the mandate that an order of remand should not be "reviewable on appeal or otherwise".

A fortiori, as to a *stay* of a remand order!

POINT II

The federal court, in the interval between removal and remand, acted with jurisdiction, and, therefore, validity attached to whatever was done in that interim period, subject, after remand, to reappraisal by the State court.

According to petitioner, for almost three years, the case was in limbo*—certainly not pending in the State court (U.S.C.A., § 1446[e], § 1447[c]; Moore's Commentary on the U. S. Judicial Code, pp. 272-277), and, as Chaplin would now have it, not in the District Court either. A strange conclusion, not too readily to be accepted as correct! For its consequence is that, through removal accomplished by one of the third-party defendants, United Artists Corporation—which was controlled by Chaplin and his third-party co-defendants (R., pp. 36, 38)—Chaplin was rendered immune from the processes of justice.

But it is plain that the District Court did have jurisdiction.

In *American Fire & Cas. Co.* v. *Finn* (341 U. S. 6), though a judgment was vacated for lack of federal jurisdiction, this court nevertheless foreshadowed, in a footnote to its opinion (p. 18) that, notwithstanding its vacatur, a dismissal might be had as to the offending defendant,

* The remand order, except for the mandamus proceedings, would have been signed on January 26, 1954; it was signed on February 15, 1954, and cancelled on February 16, 1954 (See annex to motion submitted herewith); and, whatever be its present status, is now subject to the stay of this court.

and "a new judgment can be entered on the old verdict without a new trial"—as was, thereafter, in fact done (*Finn* v. *Am. Fire & Cas. Co.* [C. A. 5], 207 F. 2nd 113). The Court of Appeals said:

> "* * * federal jurisdiction was imperfect or defective, but it was not wholly lacking. The district court had jurisdiction to determine its own jurisdiction, to order the pleadings recast and the parties realigned according to their real interests, and at any time before final judgment to dismiss or remand for want of federal jurisdiction as justice required, 28 U.S.C., § 1441(c)." (p. 115)

A far cry from the assertion of Chaplin, here, that all in the interval between removal and remand, was void!

The removal statute itself, as we now have it, demonstrates that, inherent in the removal-remand concept of jurisdiction, is the power and discretion vested in the court, to make the decision—not only as to whether it will retain the case, as a whole, but as to whether, in the exercise of its discretion, it will choose to remand a part. The District Court

> "*in its discretion*, may remand all matters not otherwise within its original jurisdiction" [U.S.C.A., § 1441(c)]

Such a jurisdiction is not void, though its acts, upon remand, may be subject to State court reappraisal. Otherwise, since, under the present Judicial Code, the State court may not act (Moore, Commentary on the Judicial Code, p. 217, ¶ 0.03[31]), there would be a hiatus in which justice would founder altogether.

Only the federal court has the power to decide whether the removal was authorized. The question is a "federal one", and "the State court is given no right to review or control the exercise of the jurisdiction of the federal court" (*Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207, 220). Upon removal, "the State Court shall proceed no further unless and until the case is remanded" [U.S.C.A., § 1446, subd. (e)]. The power to decide the issue of removability, is a part of the federal court's jurisdiction. Another part is the authority to bring in new parties,

such as the petitioner herein. So, the removal statute explicitly declares that, after removal:

> "In any case removed from a State court, the District Court may issue all necessary orders and *process* to bring before it all proper parties whether served by process issued by the State court or otherwise." [U.S.C.A., § 1447 (a)]

Furthermore,

> "In all cases removed from any State court * * * in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such District Court." (*id.*, § 1448)

And defendants so brought into the federal court, by its process, acquire status to move the court's action:

> "This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case." [U.S.C.A., § 1448]

And it is only on remand that:

> "The State court may thereupon *proceed* with such case." [*id.*, § 1447(c)],

reaching back, if it sees fit to do so, to reappraise what was done by the federal court, in its interim jurisdiction. This would not, as petitioner suggests (p. 15), be by way of State appellate "review" of what was done by the District Court, but rather by way of its independent prerogative of reappraisal of what was done in the federal court, and as to what validity the State court may choose to assign to it (cf. *Tillman* v. *Russo-Asiatic Bank,* 264 N. Y. 467; also *General Investment Co.* case, *supra*).

The issue of "jurisdiction", upon which Chaplin predicates his petition to this court, is therefore spurious.

When there is remand, the District Court does not thereby certify that it has never had "jurisdiction", but only that it should not, in its omnipotence, have exercised its undoubted jurisdiction. Remand is truly an act of abnegation.

Accordingly, no inference is implicit, in the remand of a cause theretofore removed, that all that occurred in the interval is to be deemed void. Rather, the most that may be said is that, after remand, what occurred in the interval between removal and remand may be disregarded, by the State court, if it should so decide. So, depositions taken may retain their vigor (*Ayers* v. *Wiswall,* 112 U. S. 187); a warrant of attachment vacated, may remain vacated (*Tillman* v. *Russo-Asiatic Bank,* 264 N. Y. 467); State process vacated by the federal court, unless transgressing constitutional limits, need not be, but may be, reinstated.

So real has been the federal court's jurisdiction, that the parties have it within their power, even in a case in which remand should have been made, to permit the District Court to render a valid judgment, which will not be subject to collateral attack (*Chesapeake & Ohio Ry. Co.* v. *McCabe,* 213 U. S. 207, and cases cited; *In Re Metroplitan Trust Co.,* 218 U. S. 312; *Des Moines N. & R. R. Co.* v. *Iowa Homestead Co.,* 123 U. S. 552; *Dowell* v. *Applegate,* 152 U. S. 327; *Chicot County Dist.* v. *Bank,* 308 U. S. 371, 376; *Stoll* v. *Gottlieb,* 305 U. S. 165, 171; *Windholz* v. *Everett* [C. A. 4] 74 F. 2d 834. See also, Moore, *Commentary on the Judicial Code,* p. 219, para. 0.03 [31]).

As these cases hold, proceedings in the federal court, between removal and remand, are not nullities.

Nor would a judgment succumb, even to *direct* attack, where there was original diversity jurisdiction, in the first instance, and judgment has resulted, or where there has been only modal or formal defect, in the removal proceedings, or where, by the time of judgment, the conditions for removal jurisdiction—at any rate, of the parties—had been acquired (*American Fire & Cas. Co.* v. *Finn,* 341 U. S. 6, 16).

Furthermore, there was always original jurisdiction, in the case at bar, between the removing third-party defendant (United Artists) and the third-party plaintiff (Kravetz). Remand was required, not because there was lacking

diversity of citizenship as between the two, but because there was not, as required by the removal statutes, a separate and independent cause of action between them, as distinguished from other parties. Such a defect, while requiring remand, did not run afoul of constitutional, as distinguished from removal prerequisites (cf. U. S. Constitution, Art. III., and U.S.C.A., § 1332, with U.S.C.A., § 1441 [b]; also, on an analogous phase, *Polizzi* v. *Cowles Magazines,* 345 U. S. 663, 665). Because the third-party plaintiff (California) could have sued the removing third-party defendant (Delaware) as the sole defendant, the federal courts would have had original diversity jurisdiction, and, therefore, whatever was done in the interval between removal and remand, was not void (*Des Moines N. & R. R. Co.* v. *Iowa Homestead Co.,* 123 U. S. 552; *Guarantee Co.* v. *Mechanics, etc.* [C. A. 6], 80 F. 766; cert. den. 169 U. S. 736; *Phila. & Boston Face Brick Co.* v. *Warford* [C. C. Mass.], 123 F. 843; *Monroe* v. *United Carbon Co.* [C. A. 5], 196 F. 2nd 455; *Strickland Transportation Co., Inc.* v. *American Dist. Co.* [C. A. 5], 198 F. 2nd 546; *Bailey* v. *Texas Co.* [C. A. 2], 47 F. 2nd 153).

It is not surprising that, overlooking all of these considerations, petitioner reveals the lack of any sound basis for his application, in confused and inconsistent characterizations of the District Court's conduct in the interval between removal and remand.

So, at page 5, petitioner incorrectly states that, "concededly", the District Court "never acquired valid jurisdiction over the action"—thus confusing statutory prerequisites to removal, whether properly or improperly observed, and the exercise of a jurisdiction, nevertheless existing by reason of compliance with constitutional requirements.

And, at page 11, petitioner refers to "lingering after-effects in the subsequent proceedings" of orders which, he asserts, are void—thus ignoring that, if void, said proceedings are just as void when called into question in the State courts, which should be afforded the opportunity, in the first place, to make their own decision.

Yet, thereafter, petitioner recognizes that, once the cause has been removed, whether rightly or wrongly, the federal court has jurisdiction. For he asserts: "It cannot be denied that, following removal, the case was in the federal court," and that the "law may be" that a State court "has no power to affect orders made under the paramount authority of the United States courts in a period in which a case was under their control" (p. 15). How, if void?

And, later, petitioner again confuses the concept of authority to remove, with that of authority to control the cause, once removed, when he asserts that "The acts of the federal court were the acts of a tribunal whose acquisition of control over the action was without basis" and, therefore, "voidable" (p. 19)—something, of course, different from "void"; and, again, that the District Court "had no jurisdiction over the subject-matter of the action" and, therefore, "did not acquire valid jurisdiction over the person of petitioner" (p. 21).

Finally, petitioner utterly confuses the District Court's power to exercise jurisdiction, with the "right" and "wrong" of the result accomplished. So, petitioner asserts that the District Court never acquired "rightful jurisdiction", and that it had a "wrongful jurisdiction" (p. 21).

And the climax is reached when, though asserting that all that the District Court did was void, petitioner nevertheless asserts that what is void for the federal court, may for the State court, become valid, and be handed over as such, and that, accordingly, the federal court's "refusal" to vacate its own orders "constitutes an attempt to exercise an unwarranted control over the subsequent course of the action", and that, consequently, there will be "an unjustifiable enlargement of the rights of respondent at the expense of the rights of petitioner", since the District Court "proposes to convey" its jurisdiction "to the State court" (p. 22). How, if the District Court had none?

Only from confusion worse confounded, may such strange powers be ascribed to a void jurisdiction!

A jurisdiction which will not brook interference by the State courts, and is so fluid that the statutory prerequisites to removal, if violated or lacking, may be supplied until judgment is rendered, and even on a new trial after a prior judgment has been vacated for failure to satisfy those prerequisites, and whose intermediate orders—including service of process—are authorized by statute and enforced in the federal court as effective, and the effectiveness of all of which depends upon the federal court's own *ipse dixit,* can hardly be said to be void! Certainly, not on a record such as that here, in which the undoubtedly *existing* facts establishing that there was diversity of citizenship in accordance with constitutional standards, are not shown by the record! (We offered to stipulate on these facts, but petitioner refused.) A disposition as far-reaching as that which Chaplin seeks, should await a record in which all that is material will be developed, not suppressed.

POINT III

Upon remand, the case goes to the State court in its status as just before the remand.

The following authorities establish that, when the District Court, on remand, relinquishes its hold, it should send the case back as at the time just before remand, so that the State court may then proceed as it sees fit. The District Court should not fashion a mould within which the State court must act. (*Marchant* v. *Mead-Morrison Mfg. Co.* [C. A. 2] 11 F. 2nd 368).

That a pending appeal is thus cut off, is immaterial:

"The right of an appeal is not inherent. It is purely a matter of statute." (*In Re Maryanov,* 20 F. 2nd [D. C. E. D. N. Y.], 939, 941, citing *National Bank* v. *Peters,* 144 U. S. 570; see, also, *Nat. Farmers Bank* v. *Moulton* [C. A. 8], 32 F. 2nd 78.)

As was said in *United States* v. *Rice* (327 U. S. 742):

"upon the remand the litigation should proceed in the State court from which the cause was removed." (pp. 751-2)

As was said in *Cates* v. *Allen* (149 U. S. 451):

"It will be for the state court to determine what orders should be made, if any, in regard to the amounts complainants have received under the decrees of the circuit court." (p. 461)

As was said in *Metropolitan Cas. Co.* v. *Stevens* (312 U. S. 563), with respect to the State court's prerogatives in a remanded case, as to proceedings in the federal court:

"* * * it was for that court to determine the effect of the disclosure filed in the federal court." (p. 569)

As was said in *Ayers* v. *Wiswall* (112 U. S. 187):

"It will be for the State court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the other jurisdiction." (pp. 190-191)

Petitioner's reliance upon *Ayers* case (*supra*), to show that, on remand, all interlocutory proceedings should be declared void is quite mistaken. The provision upon which petitioner relies was contained in the order of the District Court, and was incident to the District Court's ruling that, because there was no jurisdiction, the proceedings in the cause should be set aside and the cause remanded—*i.e.*, the mere generalizations following a holding of lack of jurisdiction. In any event, that provision was not the subject of controversy on appeal. On the contrary, all that was in issue was whether the cause should be remanded, and all that the court decided was that a remand was proper, and, in the course of that decision, made the observation that what should happen to interlocutory proceedings would be for the State court to determine. The distinction which petitioner suggests, between what was done by the federal court, and what was done by the parties, is without substance. In the first place, *Brown* v. *Fletcher* [C. A. 2] (206 F. 461, 465), which petitioner cites, was reversed by this court in 237 U. S. 583. In the second place, the phraseology which petitioner quotes referred to nothing here material, but only as to what effect might, in the State court, have been given to an appearance made by the complainants in the federal court, had the fact of such appearance been

certified in the remand papers—which attaches validity rather than invalidity to what was done in the federal court.

In *Gurnee* v. *County of Patrick* (137 U. S. 141), it was held that, although the court had sustained a demurrer to the complaint, no appealable judgment resulted, because the court had, *as a part* of the same disposition, remanded the case to the State court.

Uniformly to the same effect, and holding that it is for the State court to determine "the effect" of federal interim orders: *Metropolitan Casualty Co.* v. *Stevens,* 312 U. S. 563, 569; *Mayflower Industries* v. *Thor Corp.* [C. A. 3], 184 F. 2d 537; cert. den. 341 U. S. 903; *Broadway Ins. Co.* v. *Chic. G. W. Ry. Co.* [C. C. W. D. Mo.], 101 F. 507; cited with approval in the *Metropolitan* case, 312 U. S. 563, *supra; Doran* v. *Elgin Coop. Credit Assn.* [D. C. Neb.], 95 F. Supp. 455; *Levine* v. *Buick-Olds-Pontiac Sales Co.* [D. C. Ohio], 12 F. Supp. 547; *Ransom* v. *Sipple Truck Lines* [D. C. Iowa], 52 F. Supp. 521; *Kristiansen* v. *National Dredging Co.* [D. C. E. D. N. Y.], 4 F. Supp. 925; *Olds* v. *Brown Shoe Co.* [D. C. Mo.], 25 F. Supp. 880.

In *Iowa Central R. Co.* v. *Bacon* (236 U. S. 305), the point is succinctly made that any adjudication of the federal court, short of *judgment,* need not be respected.

Indeed, in *Waco* v. *U. S. Fid. & Guar. Co.* (293 U. S. 140), upon which Chaplin mistakenly relies, this court reversed an order which had violated these principles, so that the *status quo* as at the time just before remand, should be restored, and all phases of the case left for disposition by the State court. In this court, the defendant complained that, in further proceedings in the State court to which the cause had been remanded, the federal dismissal of its third-party cross-claim would be "treated as conclusive." This court observed that the Court of Appeals did not intend any such result, for, in its opinion, the Court of Appeals had said that all matters were for the State court's action, "unaffected by the *attempt* of the Federal Court to dismiss the City's cross-action * * *," and, accordingly, held that the Court of Appeals should have consid-

ered, on its merits,* defendant's appeal, from the judgment of the District Court dismissing the cross-claim, as, otherwise, "the cross-action will be no part of the case which is remanded to the State court." (p. 143)

The rationale of the decision was that the case should go back on remand as it was just before remand, *i.e.*, that the federal court, when it orders remand, should do that and nothing more:

> "Indeed, if the District Court was right, *the cause could not have been remanded except for the exclusion of the Fidelity Company as a party.* True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. *Indisputably this order is the subject of an appeal;* and, if not reversed or set aside, is conclusive upon the petitioner.
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> * * *
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> "A reversal cannot affect the order of remand, but it will at least, if the dismissal of the petitioner's complaint was erroneous, *remit the entire controversy, with the Fidelity Company still a party, to the State court for such further proceedings as may be in accordance with law.*" (pp. 143-144)

It will be observed that in the *Waco* case, there was no stay of the remand order, which had become operative—so divorced from the remand was the final judgment which had preceded it. *But here, petitioner recognizes that what it seeks is a part of the remand disposition!*

The conclusion reached in the *Waco* case would be impossible, unless what is done by the District Court, between removal and remand, is deemed not void, but valid. It was therefore that the District Court should have remitted

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* As shown by *Pabellon* v. *Grace Line Inc.* [C. A. 2] (191 F. 2nd 169, cert. den 342 U. S. 893), as the law then stood (see p. 173), the dismissal of the cross-claim resulted in an appealable judgment, which—because it was not an incident of remand, as in the *Gurnee* case (*supra*), but the foundation for and cause of remand—was appealable—for, if reversed, there would be no basis for remand.

"the entire controversy, *with the Fidelity Company still a party,* to the State court for such further proceedings as may be in accordance with law" (pp. 143-4).

Whose law, if not that of the State?

Indeed, the post-remand opinions of the Texas courts, in the *Waco* case, show that the Texas courts proceeded "regardless of the procedure had in the federal court" (U. S. *Pipe & Foundry Co.* v. *City of Waco,* 100 S. W. 2d 1099, 1110-1111; aff'd 108 S. W. 2d 432, (p. 1111). Indeed, there is no reference to the disposition made by this court in 293 U. S. 140, although the Court of Appeals, in obedience to this court's mandate, had reinstated the cross-claim theretofore struck out (*City of Waco* v. *U. S. F. & G. Co.,* [C A. 5], 76 F. 2d 470). Moreover, this court thereupon denied certiorari to the State court (302 U. S. 749).

Petitioner's argument, touching the *Waco* case, defeats itself (p. 12). If a Court of Appeals may review a final judgment, dismissing a cross-claim, this is not because the District Court lacked jurisdiction, but because it had it, and because it was not the kind of adjudication which would survive the final State judgment so as, at that time, to be subject to review by this court (cf. *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 545-7).

There is nothing about the issue as to whether service of process made upon Chaplin in the District Court was valid, which changes the rules thus applicable. An issue as to process is not different from any other issue. The Congressional mandate is not subject to any exceptions. The inhibition of any review, by appeal or otherwise, is absolute.

So, the New York Court of Appeals, in affirming an order of the New York Supreme Court, made after remand, certified the *nunc-pro tunc* validity of an order of the District Court, vacating a warrant of attachment on which jurisdiction depended: "The effect of the ex parte order at Special Term was merely to create a notation on the record of valid action taken by the Federal court" (*Tillman* v. *Russo-Asiatic Bank,* 264 N. Y. 467, 468).

POINT IV

Petitioner, if he has any grievance, has an adequate remedy in the New York courts and, in the event of an adverse final judgment, in this Court.

Chaplin's fears—that he may not be heard in the New York courts, to challenge the service of process upon him—are without foundation. It is plain that N. Y. Civil Practice Act, § 237a, reflects substantially the same special appearance procedure, available to Chaplin in the New York courts, as would have been available to him, in the District Court under F.R.C.P. 4.

The New York statute, insofar as material, is sufficiently set forth in Appendix A of Petitioner's Brief, but is not correctly apprehended.

The operation of the mandate of the New York statute, *i.e.*, that "After a motion made pursuant to this section has been denied, the defendant may litigate the action on the merits, without being deemed to have waived his objection to the court's jurisdiction over his person", is not limited to a case in which the objection to jurisdiction was made, literally under section 1. The phrase, "pursuant to this section", as used in Subdivision 4, refers back to the "manner" in which the objection was raised, under Subdivision 1. Surely, Chaplin's motion, in the District Court, was made in identical "manner".

Furthermore, there was and is no possibility that the New York courts may deem that Chaplin appeared generally. For, certainly, under the federal practice, he did not do so; and, since he was not a party to the action before its removal from the State court to the federal court, but was served with process in the federal court only after removal, the act of another party, in removing the cause, may not, be deemed a general appearance by Chaplin (*General Investment Co.* v. *Lake Shore Ry. Co.*, 260 U. S. 261, 267). *Henderson* v. *Henderson* (247 N. Y. 428), cited by petitioner (p. 13) has no application. There, appearance was made by conduct during the trial. Furthermore, whether or not a court has jurisdiction of the person of a defendant, is, of course, a basic question, in the New

York courts as elsewhere (*Olmstead* v. *Olmstead,* 190 N. Y. 458, 466; *Hunt* v. *Hunt,* 72 N. Y. 217, 225). If there be any merit to Chaplin's assertions that he was never made a party, whether the federal court lacked jurisdiction to make him one, or the service was not made upon him in accordance with federal rules, he may be heard, after he has cause to complain, should judgment go against him in the State courts, and should this court conclude to hear him (*McDonald* v. *Mabee,* 243 U. S. 90; *Milliken* v. *Meyer,* 311 U. S. 457). It is, therefore, contrary to Chaplin's fears, impossible for the New York courts to "foreclose" (p. 10) consideration by this court of the issue of jurisdiction of Chaplin's person.

No reason appears, therefore, for piecemeal appeal, such as Chaplin seeks, by indirection, to accomplish at this time.

Furthermore, were Chaplin's views to be adopted, the New York courts would be deprived of all choice. They could not recognize the federal service of process upon Chaplin, because he would have been eliminated prior to remand. Nor could they bring him into the action by their own process, for, safe in Switzerland, Chaplin is no longer available.

Chaplin's rights may be protected, and respondent Kravetz's too, only by sending the case back in its present status, so that the State courts may be able to exercise their own discretion, and so that, in due course, should their decision be to sustain the federal service of process, this court, in the light of all that has gone before, may consider whether it will decide the real issue—at this time, not open for review—*i.e.,* as to whether there was valid service of process according to appropriate standards.

POINT V

Remand has already become effective.

We have argued thus far without the aid of the following additional circumstances, which will not require consideration if Chaplin's application be disposed of upon the grounds thus far urged.

On February 15, 1954 (after the date of the issuance, in the mandamus proceeding, of Judge Augustus N. Hand's

stay of "all proceedings", but before notice thereof had come to the District Judge), Judge Clancy signed an order of remand, which was entered. Thereafter, on February 16, 1954, upon being made aware of Judge Hand's order, and of Chaplin's pending application in this court, Judge Clancy obliterated and cancelled his signature on the order already entered and filed, but not until the copy of the remand order had been certified, and nothing remained to be done but for the District Court Clerk to perform the ministerial act of mailing a certified copy of the order to the Clerk of the New York Supreme Court (See excerpts in accompanying motion).

The question is thus presented as to whether remand had not already become irrevocably effective.

Under the present statute, the former provision that the "remand shall be immediately carried into execution", no longer exists, but, instead, under U.S.C.A., § 1447(c), the order of remand is self-executing—the ministerial act of mailing a copy of the remand order, having for its purpose, not to put the remand order into execution, but to give the State court notice of the remand so that it may proceed (cf. analogous discussion in *Railroad Co.* v. *Koontz,* 104 U. S. 5, 14)*. So, whereas, on removal, § 1446(e) provides that "the State court shall proceed no further unless and until the case is remanded", § 1447(c) provides that, on remand, "A certified copy of the order of remand shall be mailed by its [the District Court's] clerk to the clerk of the State court. The State court may thereupon proceed with such case." It seems impossible to conclude that whether or not a Clerk of the District Court promptly per-

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* Rule 3 of the Civil Rules of United States District Courts for the Southern and Eastern Districts of New York, provides that counsel shall implement the Clerk's ministerial act. That Rule provides, in Subdivision (c) thereof:

"(c) Upon the entry of an order remanding a case to the state court, the plaintiff shall deposit with the clerk a copy thereof to be certified and mailed by the clerk to the clerk of the state court."

forms his duty of mailing a copy of the remand order, can have the effect of postponing or obstructing the effectiveness of a judge's remand order. As said in an analogous situation, the entering of the record is not necessary "for the transfer of jurisdiction" (*Railroad* case, *supra*, p. 15). True, Moore, in his Commentary on the Judicial Code, may be read to opine that the omission, in the present statute, of the phrase "such remand shall be immediately carried into execution", was "inadvertent" (p. 227), and that, therefore, the supposed rule of *Bucy* v. *Nevada Const. Co.* [C. A. 9] (125 F. 2nd 213)—*i.e.*, a dictum by a divided court, that the District Court had power to vacate its own order of remand—"should be true under the amendment of 1949". But, on analysis, it will be found that Moore's speculation is not supported either by the *Bucy* case (*supra*), or by the 1949 amendment of the Judicial Code; nor is the nullification which the *Bucy* case works of the phrase "such remand shall be *immediately* carried into execution" authorized by the contrary mandate repeatedly uttered by this Court.

The *Bucy* case (*supra*) decided that, where the federal court was *authorized* to remove the cause, an order of remand erroneously holding otherwise—if revoked and followed by acquiescence of the parties to and through judgment—might under these "special circumstances" be disregarded. The court divided on whether or not the "special circumstances"—*i.e.*, that, in fact, there had been an *authorized* removal—should make any difference. The *Bucy* case does not hold that where, as here, the case should never have been removed, a remand order once made may be revoked and jurisdiction continued. On the contrary, the *Bucy* case is quite consistent with the authorities holding that where there never was authority to remove, the remand order is self-executing. (*Garrison* v. *Atlantic Life Ins. Co.* [D. C., E. D. S. C.], 18 F. Supp. 469; *Leslie* v. *Floyd Gas Co.* [D. C., E. D. Ky.], 11 F. Supp. 401; cf. exposition in the dissenting opinion in the *Bucy* case.)

With reference to the 1949 amendment of the Judicial Code, Moore says, at page 227: "The seventh sentence of former § 71 provided that if the District Court ordered the case remanded, 'such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed.' Inadvertently, this was omitted in the new Code, *but its substance has been added by the Amendatory Act of 1949.*" Not so, however, unless the amendment be construed to eliminate the gloss put upon the word "immediate", by the *Bucy* case! It is more reasonable to suppose that the Congress omitted the "immediate" execution phrase because the *Bucy* case had distorted it into the negative of what it said. At any rate, the 1949 amendment added only Subd. (d) of § 1447, touching review, and nothing else. So, Moore correctly appreciates, at another point: "While the Code as originally enacted inadvertently omitted the former provision that a remand order made by the district court *is not reviewable,* the Amendatory Act of 1949 *so provides*" (p. 91). The only inadvertence—*i.e.,* the omission to provide against review, by appeal or otherwise—was all that was corrected in 1949 (§ 1447[d]; cf. Moore, pp. 91, 217, 280-281). When the 1949 amendment provided that the remand order should not be "reviewable on appeal *or otherwise*", it forbade vacatur too. Jurisdiction once lost could not be reviewed. For, otherwise, prohibition against review would not exclude changes of any kind, whether by appeal "or *otherwise.*" For if a District Judge may, *sua sponte,* vacate his own order, one day after it has been entered, he may do so at any time—even much later—and thus, at will, re-vest a jurisdiction already divested. Thus would the evils of vacillation and delay be perpetuated, though it was the Congressional policy to prevent just that.

To hold otherwise, in the light of what was actually decided, under the special circumstances, in the *Bucy* case (*supra*), and, under distinguishing circumstances, in the *Garrison* and *Leslie* cases (*supra*), is to read into the statute what it does not say, and what is contrary to the policy of the law. The history of the removal statutes may

not be ignored (*United States* v. *Rice,* 327 U. S. 742; *Shamrock Oil Corp.* v. *Sheets,* 313 U. S. 100, 106-7).

Nothing in F.R.C.P. 60(b) is to the contrary. For the power of a judge, on his own motion, to modify or vacate his own inadvertent orders or judgments, must be conditioned upon a continuance of a residual jurisdiction to act at all. A court may not—contrary to the Congressional mandate—mend its hold, where it has lost jurisdiction to hold on at all.

Nor does the fact that Judge Augustus N. Hand—we assume, pursuant to F.R.C.P. 62(g)—purported to issue an *ex parte* stay, in aid of the Court of Appeals' supposed appellate jurisdiction, affect these conclusions. F.R.C.P. 62(g) authorizes a stay of "all proceedings", only in aid of appellate jurisdiction. Here, what was stayed was the execution and operation of a remand order, which was not subject to appeal, in whole or in part. All that had been pending in the Court of Appeals was an application for mandamus or certiorari, to review the scope of a remand order. Such a stay was not in aid of that court's appellate jurisdiction—which did not exist, and the exercise of which, Congress had forbidden. This, even if a "stay of all proceedings", in the wake of a denial of either a writ of mandamus or certiorari, may, by any chance, be deemed a stay of the entry of a remand order in an action, no part of which was or could be the subject of any appeal to the Court of Appeals!

Accordingly, a stay which is unauthorized and, therefore, void, may not be deemed to invalidate a remand order, incapable of review by appeal or otherwise.

POINT VI

The Court of Appeals denied mandamus, not only by reason of its doubt that it had any authority to issue a writ, but in the exercise of a sound discretion, in accord with an unbroken line of authorities. Therefore, under well-settled principles, certiorari by this court is not justified.

It would seem plain that there is here nothing of substance which, under the rules of this court, touching the

grant of its writs of certiorari, at this time deserves review. Not only is there lacking any conflict of authorities, but, on the contrary, what Chaplin seeks would reverse the settled law.

Nor, as we have seen, is Chaplin faced with any exigency as to which he is without remedy in an appropriate forum. Without prejudice, and under rules substantially the same as would have been available to him in the District Court, he may be heard in the New York State Supreme Court. If still dissatisfied, he may, after final judgment, apply to this court.

If there is to be any certiorari—assuming, but not conceding, that an appropriate foundation for such an application may eventuate—such development may occur only after a New York final judgment, adverse to Chaplin, has been entered, presenting the real issue, *i.e.*, as to whether the State court, if it shall have chosen to do so, may give recognition to the federal service of process, and, if it shall have done so, as to whether said federal service of process may, by the State court, within constitutional limits, be deemed valid—an issue which is not now here, and which can never be here if the status of the cause, as it was just before remand, is now disturbed by a premature review of an academic question as to whether the District Court had the jurisdiction which the Congress unmistakably gave to it exclusively.

CONCLUSION

The petition for certiorari should be denied, and the stay vacated.

Respectfully submitted,

Jay Leo Rothschild,
Counsel for Defendant-
Respondent, Kravetz.

Meyer Boskey,
Attorney for Defendant-
Respondent, Kravetz.

Supreme Court of the United States

OCTOBER TERM, 1953

No. .....

CHARLES CHAPLIN,

Petitioner,

against

HON. JOHN W. CLANCY, District Judge of the United States for the Southern District of New York,

Respondent.

Defendant-respondent Kravetz moves:

To include in the record before this court, on petitioner's application for certiorari, the proceedings in the District Court for the Southern District of New York, following denial of relief, by the United States Court of Appeals for the Second Circuit—*i.e.*, the signing and entry of a remand order by District Judge Clancy, and its purported withdrawal, photostatic copies of which are submitted herewith, and the material portions of which are annexed hereto.

JAY LEO ROTHSCHILD,
Counsel for Defendant-
Respondent, Kravetz.

MEYER BOSKEY,
Attorney for Defendant-
Respondent, Kravetz.

Affidavit in Support of Prefixed Motion.

UNITED STATES OF AMERICA
STATE AND COUNTY OF NEW YORK } ss.:

JAY LEO ROTHSCHILD, being duly sworn, deposes and says:

I am counsel for the defendant-respondent, Kravetz.

As appears from the papers submitted both in support of and in opposition to the third-party defendant Chaplin's petition for certiorari, now pending, a stay of "all proceedings"—including, by implication, the entry of any remand of the action—was issued by Mr. Justice Jackson on February 19, 1954, and is now in force.

On February 15, 1954, District Judge Clancy—without knowledge that a similar stay had been granted, on February 11, 1954, by Judge Augustus N. Hand, of the Court of Appeals for the Second Circuit—signed an order of remand, which was entered by the Clerk of the District Court, on the same day. On the next day, *i.e.*, February 16, 1954, Judge Clancy, having become aware of said stay granted by Judge Hand, withdrew his order of remand, by obliterating his signature therefrom and making an entry to that effect in the District Court's docket.

We believe such attempted revocation of the remand order to be a nullity, and so argue, among other things, in our opposition to the petition for certiorari.

Furthermore, we deemed it the duty of counsel to make this court aware of these facts, for whatever significance it may choose to accord them as terminating the jurisdiction of the District Court—which termination, we contend, has occurred. But counsel for petitioner, when asked to cooperate, were of the opinion that events, even of this character, were not properly part of the record in this court, because said events occurred after the denial of relief by the Court of Appeals, and were not reflected in the record before that court. We think otherwise, for two reasons:

(1) The validity of Judge Clancy's aborted remand order depends upon whether Judge Hand's stay was valid, and, accordingly, affects the issue as to whether, notwithstanding said stay, anything remained of federal jurisdiction upon which to predicate action by this court;

(2) In any event, whatever be the correct view, the facts thus eventuated should be presented, so that this court, in whatever disposition it may choose to make, may be acting with knowledge of those facts, and counsel be free from possible criticism for having joined in presenting an academic question.

We think the situation quite the same and, therefore, governed by the same principles as if, pending an application to this court, the case were settled, or other happening occurred which made unnecessary the decision of other questions presented, and that, accordingly, the court should be apprised of the facts.

It is, therefore, respectfully requested that, pursuant to F.R.C.P. 75(h), incorporated in this court's Rule 10(2), relief be granted as requested, making the certified copies of the District Court's record, submitted herewith,—pertinent parts of which are annexed hereto, a part of the record before this court on the petition for certiorari.

JAY LEO ROTHSCHILD,
Counsel for Defendant-
Respondent, Kravetz.

Sworn to before me this
18th day of March, 1954.
ROSALIE HARRISS ROSS,
Notary Public, State of New York.
No. 31-8667900
Qualified in New York County
Cert. filed with N. Y. Co. Register
Commission expires March 30, 1956

Excerpts from Proceedings Touching Remand.

(Sought to be Made Part of Record)

Civ. 66-294

SIRS:

PLEASE TAKE NOTICE that the within is a copy of a proposed order which will be presented for settlement and signature by Hon. JOHN W. CLANCY, at the United States District Courthouse, Foley Square, in the County of New York, on the 26th day of January, 1954, at 10:30 o'clock in the forenoon of that day.

Dated: New York, January 21, 1954.

Yours, etc.,

MEYER BOSKEY,
Attorney for Defendant,
Rina M. Kravetz.

• • •

At a Term for Motions of the United States District Court for the Southern District of New York, held at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 27th day of January, 1954.

Present: HON. JOHN W. CLANCY, U. S. D. J.

Civil Action No. 66-294

MARY PICKFORD,

Plaintiff,

against

RINA M. KRAVETZ, as Executrix, etc.,

Defendant.

The defendant, Rina M. Kravetz, having by notice of motion dated November 13, 1953, moved this Court for an

order remanding the above entitled action to the Supreme Court of the State of New York, County of New York, and the defendant, Charles Chaplin, having by notice of motion dated December 2, 1953, moved this Court for an order vacating the order heretofore made herein, dated November 20, 1952, denying his motion to quash the service upon him of the third party summons and cross-complaint, and requesting that the service in this Court on the defendant, Charles Chaplin, be declared to be null and void.

Now, upon reading and filing said notice of motion to remand, dated November 13, 1953, and the affidavits of Meyer Boskey, Esq. and Jay Leo Rothschild, Esq., sworn to November 13 and December 8, 1953, respectively, in support of said motion to remand, and the affidavit of Walter S. Beck, Esq., sworn to December 9, 1953, consenting to said motion to remand, and upon reading and filing said notice of motion to vacate the order of November 20, 1952 and to declare the service upon the defendant, Charles Chaplin, null and void, dated December 2, 1953 and the affidavit of Herbert B. Jacoby, Esq., sworn to December 2, 1953 in support of said motion to declare said service null and void, and said motions having regularly come on to be heard at a Motion Term of this Court on December 10, 1953, and after hearing Jay Leo Rothschild, Esq., of counsel, for the defendant, Rina M. Kravetz, in support of the motion to remand and in opposition to the motion to vacate said order of November 20, 1952 and to declare the service on the defendant, Charles Chaplin, null and void, and after hearing Herbert B. Jacoby, Esq. of counsel for the defendant, Charles Chaplin, in support of the motion to vacate the order of November 20, 1952 and to declare the service on the defendant, Charles Chaplin, null and void, and in opposition to said motion to remand, and the defendant, United Artists Corporation, having consented to said motion to remand, and none of the other parties herein having appeared in opposition thereto,

and due deliberation having been had thereon, and upon filing the opinion of the Court,

Now, on motion of Meyer Boskey, Esq., attorney for the defendant, Rina M. Kravetz, it is

ORDERED, that said motion by the defendant, Rina M. Kravetz, to remand, is granted and that the above entitled action be and the same is hereby remanded to the Supreme Court of the State of New York, County of New York; and it is further

ORDERED, that said motion by the defendant, Charles Chaplin, to vacate said order of November 20, 1952 and to declare the service upon and as against said defendant, Charles Chaplin, as null and void, is denied.

[In Longhand]
Signature Withdrawn

~~JOHN W. CLANCY~~
U. S. D. J.

JOHN W. CLANCY
Feb. 16th

STATE OF NEW YORK
CITY OF NEW YORK
COUNTY OF NEW YORK
} ss.:

JANE FRIEDMAN, being duly sworn, deposes and says:

That she is employed by Meyer Boskey, the attorney for the within named, Rina M. Kravetz, etc. herein.

That on the 21st day of January, 1954, she served the within PROPOSED ORDER WITH NOTICE OF SETTLEMENT UPON [naming various attorneys].

Extract from Docket of District Court

DATE		FILINGS—PROCEEDINGS	ATTORNEYS PLTF.	DEFT.
Nov. 20-52	Filed	Order denying motion to quash service of 3rd party summons upon 3rd party deft. Charles Chaplin, Clancy, J. Mailed notice of entry, 11-21-52		S&F
Dec. 22-52	"	Answer of 3rd party deft. Charles Chaplin to 3rd party complaint		S&F
Sept. 8-53	"	Stip. & Order substituting Bernard B. Smith as atty. in place of Davis Polk Wardwell Sunderland & Kiendl, for pltf.	x	
Oct. 15-53	"	motion papers re: to strike out pleadings. (Ret. 10/22/53) served upon Mary Pickford		
Nov. 12-53	Memo. End. on Motion filed 10-15-53: Marked "off" upon request, Goddard, J.			
Nov. 17-53	Filed	Affdvt. & Notice of Motion to remand—Ret. 11-19-53		MB
Dec. 3-53	"	Notice of Motion that upon granting remand, to make an order vacating order denying motion of 3rd party deft. Charles Chaplin to quash service of 3rd party summons—Ret 12-10-53		S&F
Jan. 12-54	"	Affdvt. of Jay Leo Rothschild		
Jan. 12-54	"	" " Walter S. Beck		

DATE		FILINGS—PROCEEDINGS	ATTORNEYS PLTF.	DEFT.
Jan. 12-54	"	Opinion #20,892 Motion of 3rd party deft. Chaplin to vacate service on him denied; motion to remand granted on consent of United Artists Corp. and on its merits,—Clancy, J.		
Feb. 11-54	"	Certified Copy of U.S.C.A. Order staying proceedings pending application for writ of certiorari to Circuit Justice on or before 2-16-54 (microfilmed 2-17-54)		
Feb. 15-54	"	Order remanding action to Supreme Court, N. Y. County, Clancy, J. Mailed notice of entry 2-16-54		MB
Feb. 16-54		Signature withdrawn, John W. Clancy (on Order filed 2-15-54) (order returned to file)*		
Feb. 20-54		Filed Certified Copy of U. S. Sup. Ct. Order staying all proceedings pending disposition of petition for certiorari to be filed on or before 3-11-54, etc.		
2/11/54*		Do not remand await outcome of certiorari*	See Tray of J. B.*	

* These portions, appear in pencilled longhand.

Office - Supreme Court, U.
FILED
MAR 2 1954
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

October Term, 1953

No. 630

CHARLES CHAPLIN,
Petitioner,

vs.

HON. JOHN W. CLANCY,
Respondent.

CHARLES CHAPLIN,
Third Party Defendant-Petitioner,

vs.

RINA M. KRAVETZ, as Executrix, etc.,
Defendant-Respondent,

and

MARY PICKFORD,
Plaintiff,

and

THE PICKFORD CORPORATION, UNITED ARTISTS CORPORATION, ARTHUR B. KRIM, ROBERT S. BENJAMIN, SEYMOUR M. PEYSER, MATTHEW FOX, WALTER E. HELLER & CO. INC., PAUL V. McNUTT and FRANK L. McNAMEE,
Third Party Defendants.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI AND IN OPPOSITION TO MOTION TO CORRECT DIMINUTION OF THE RECORD

MYLES J. LANE,
Counsel for Petitioner.

APPELLATE PRESS CORP., 114 WORTH STREET, N. Y., COrtlandt 7-7627

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Defendant-Respondent,

and

MARY PICKFORD,

Plaintiff,

and

THE PICKFORD CORPORATION, UNITED ARTISTS CORPORATION, ARTHUR B KRIM, ROBERT S. BENJAMIN, SEYMOUR M. PEYSER, MATTHEW FOX, WALTER E. HELLER & CO. INC., PAUL V. McNUTT and FRANK L. McNAMEE,

Third Party Defendants.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI AND IN OPPOSITION TO MOTION TO CORRECT DIMINUTION OF THE RECORD

Statement

This reply brief is submitted in support of the petition for certiorari herein and in opposition to respondent's motion to correct diminution of the record.*

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* Unless otherwise indicated, references are to pages of the printed record.

POINT I

Certiorari is warranted by the questions presented.

Respondent's brief in opposition proceeds upon the basic assumption that the petition below sought review of part of an order of remand. That assumption is incorrect. The petition below did not request any such review. The Court of Appeals was requested only to consider the proceedings taken prior to remand with regard to the service of process. The Court was requested either to issue mandamus to direct vacatur of these proceedings or, in the alternative, to issue common law certiorari to review on the merits the order denying the original motion to quash the service (10-1, 15-6).*

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* We have stated that the District Court's order upholding the purported service upon a hotel manager was clearly erroneous. While the respondent made no attempt to sustain the propriety of that ruling in the Court of Appeals (76-91), his brief in opposition herein addresses itself momentarily to the merits. Respondent now asserts that petitioner has nowhere established that California was still his permanent residence at the time of the purported service (brief, pp. 2-3). This was not the theory adopted by the trial court (18-22), nor has respondent urged it previously.

There is no factual basis whatsoever for this new theory of respondent, and it is based upon a misstatement of the record. The affidavit of petitioner's attorney on the motion to quash contained the following undisputed statement (29): "The defendant Chaplin is and has been a resident and domiciliary of California continuously from 1914 to the present time—a period of some 38 years. Since approximately 1925 his dwelling house or usual place of abode has been 1085 Summit Drive, Beverly Hills, California. * * *" Furthermore, it is a matter of public record that petitioner, a resident alien, left this country on what was to be a temporary visit, and that it was the unexpected *subsequent* action of the Government which prevented him from returning. See New York Times, September 20, 1952, pp. 1, 16. It is significant that respondent has adopted this new theory and has deserted the reasoning of the trial court.

It should be noted that this action was pending for sixteen months prior to petitioner's visit to New York, 3,000 miles from his home. Suit could effectively have been brought in California, the state of petitioner's residence, at any time during that period.

The circumstance that the District Court had refused to vacate its proceedings at the time of its decision to remand the case did not make that refusal part of the remand. In *Waco* v. *U. S. Fidelity & Guaranty Co.*, 293 U. S. 140, the dismissal as against the third party defendant was held to be reviewable notwithstanding the simultaneity of that decision with the order of remand.* Likewise, in the recent case of *Komlos* v. *Compagnie Nacionale Air France* (2d Cir.), 209 F. 2d 436, an order dismissing a complaint was held to be reviewable notwithstanding simultaneity with an order of remand. Furthermore, insofar as the petition below sought common law certiorari, it was addressed directly and exclusively to proceedings which had taken place before the motion for remand was made.

In short, it is our view that where a Federal District Court has erroneously assumed jurisdiction over additional parties prior to remand, then appropriate disposition must be made of those proceedings before transmission of the case to the State Court. In cases where the Federal proceedings result in an appealable order, such disposition may be effected through the medium of an appeal from that order. *Waco* v. *U. S. Fidelity & Guaranty Co., supra,* 293 U. S. 140. We submit that, in like manner, in the case of clearly erroneous jurisdictional rulings where review will otherwise be cut off, appropriate disposition may be effected through the medium of an extraordinary writ. Cf. *House* v. *Mayo,* 324 U. S. 42, *Ex parte Metropolitan Water Co.,* 220 U. S. 539.

The bulk of respondent's brief addresses itself to the question of whether vacatur is the appropriate disposition. In substance, the respondent's argument is that Federal proceedings in improperly removed cases are not

* In *Gurnee* v. *County of Patrick,* 137 U. S. 141, cited by respondent for the contrary proposition (brief, p. 22), the order sought to be reviewed was the remand itself, although the procedural device used was a demurrer addressed to the jurisdictional point.

absolutely void. In support thereof he cites decisions like *Metropolitan Casualty Co.* v. *Stevens,* 312 U. S. 563, in which, as a result of the peculiar facts, the District Court was no longer in a position to enter an order of vacatur at the time of remand. This argument of the respondent, we submit, misses the mark entirely. The issue is not whether Federal proceedings are absolutely void in the absence of an order of vacatur, but whether the Federal Court should enter such an order at the time of remand if it is in a position to do so.

In any event, whether the Court of Appeals should have directed vacatur of the proceedings below, or whether it should simply have reviewed them on the merits, we do not believe it was proper to order their transfer to the State Court in raw, uncorrected form.

The respondent blandly suggests that the question of the disposition of the Federal proceedings is a matter for the State Courts and that, even absent an order of vacatur, the State Courts will be free to ignore completely the determinations of the Federal Court. However, the danger of remanding uncorrected Federal proceedings is demonstrated by the decision of the New York Court of Appeals in *Tillman* v. *Russo Asiatic Bank,* 264 N. Y. 467. In that case, the State Court evidently did not consider itself free to reconsider the Federal rulings, and confined itself to creating "a notation on the record of the valid action of the Federal Court" (264 N. Y., at p. 468).

As authority for his contention that the State Court may disregard the Federal rulings, respondent cites *Iowa Central RR Co.* v. *Bacon,* 236 U. S. 305 (brief, p. 22). A perusal of the *Iowa* decision reveals that it stands for no such proposition. That case had to do only with the validity of State Court proceedings taken after and notwithstanding a removal, as was permissible under the practice of that era. This Court's decision held only that

the State Court proceedings were valid inasmuch as the Federal proceedings, which had been dismissed for lack of prosecution, had resulted in no adjudication of any kind.

As noted in our petition, the respondent's position is apparently the product of a confusion of the principles governing the respect to be accorded the judicial determinations of the Federal Court and the use to be made of the evidential material manufactured by the parties. *Ayres* v. *Wiswall,* 112 U. S. 187, 190; *Brown* v. *Fletcher* (2d Cir.), 206 F. 461, 465, reversed on other grounds 237 U. S. 583.*

Also cited by respondent in support of his position that no action is required by the Federal Court are a number of cases in which motion was made for remand before any Federal proceedings had been taken. See *e. g., Marchand* v. *Mead Morrison Mfg. Co.* (2d Cir.), 11 F. 2d 368; *Levine* v. *Buick-Olds-Pontiac Sales Co.* (D. Ohio), 12 F. Supp. 521 (brief, pp. 21-22). However, those decisions have no application here, as to the disposition of proceedings whereby an additional party was brought into the case before the impropriety of the removal was discovered.

The respondent's brief suggests that the present record is insufficient for an intelligent disposition of the proceedings with regard to service (pp. 17-18, 20). That suggestion is without merit. The entire record of the proceedings on service was included in the petition to the Court below, and is included as a part of the record before this Court. Likewise, concerning the lack of basis for removal, the essential facts are fully set forth (pp. 5-6, 66-7). We concur with respondent that, while parties residing in various states were joined in the suit, no separate cause of action existed as between diverse parties (brief, pp. 1, 17-18). There is no dispute as to those

* Through an oversight, the reversal of the *Fletcher* case, on an entirely unrelated point, was not noted in our petition.

facts, nor is there any issue in this case as to the impropriety of the removal.*

We submit that the instant application for certiorari presents an important question in the administration of Federal justice concerning which the Court below has acknowledged definite uncertainty. Moreover, it is only at this stage of the case that this Court can resolve the uncertainty, for once the action is remanded to the State Courts, the question of the duty of the Court of Appeals to act will have become moot.

The issues that will be presented to this Court in the event that certiorari is granted can be clearly stated. First, there will be presented the question of whether the Court of Appeals erred in declining to act in the premises. Second, if that issue is resolved in the affirmative, there will be presented the further question of what action is appropriate: vacatur of the District Court's proceed-

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* The respondent's suggestion that there would have been a basis for original as distinguished from removal jurisdiction, is totally without merit. Indeed, contrary to respondent's apparent misconception, original jurisdiction is *narrower* than removal jurisdiction. Original jurisdiction requires that diversity be complete, and if there is on either side a party of like citizenship with a party on the other, original jurisdiction does not exist. Unlike the rule with regard to removal jurisdiction, no exception is made even where separate and independent causes of action exist purely as between diverse parties. Compare 28 U. S. C. §1332 with 28 U. S. C. §1441; see Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 236; Note, 60 Harv. L. Rev. 424, 431.

The respondent's attempt to ascribe significance to the possibility that Congress has constitutional power to confer jurisdiction in this type of case is likewise specious. The possible existence of such power has no bearing upon situations in which Congress has seen fit to withhold it.

Indeed, so palpably unmeritorious are these contentions, that one may wonder whether they are urged seriously or solely to lend color to respondent's unwarranted suggestions concerning the sufficiency of the record.

ings, or affirmance or reversal of the order sustaining service. It is submitted that the questions of law presented herein are sufficiently important to warrant clarification by this Court, and that, on the other hand, the reasons advanced by respondent for denying review are insubstantial.

POINT II

The reasons advanced by respondent for denying review are insubstantial.

On the date of the Court of Appeals' decision, Judge A. N. Hand of that court issued an order temporarily staying all proceedings until application could be made to a Justice of this Court for a further stay.* A copy of the stay was immediately filed with the Clerk of the District Court. Thereafter, during the pendency of Judge Hand's stay, Judge Clancy signed a purported order of remand. The existence of the stay was immediately called to Judge Clancy's attention by the Clerk of the District Court, and he promptly recalled the purported order of remand before any attempt had been made to execute it. Moving to open the record to include the recalled order, respondent now contends that Judge Clancy lacked power to recall it, and that it was "self-executing" (brief, pp. 26-30).

That contention is without merit. Under Section 1447 of the Judicial Code, remand is accomplished only when a certified copy of the order of remand has been transmitted to the State Court. The Federal Court retains residual power to revoke its order until that is done, for it is only upon such transmission that the State Court is reinvested with jurisdiction to proceed with the case. 28 U. S. C. §1447(c).

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* It should be noted that while Judge Hand's temporary stay was *ex parte*, a further stay was granted by the Circuit Justice after a hearing at which the respondent, having submitted written opposition, argued orally.

Strangely, the respondent seeks to derive comfort from the fact that nowhere in the present Code is there any direction that remand shall be carried into execution immediately, whereas the former statute did contain such a provision. While not entirely clear, his argument is apparently that the existence of the immediate execution provision in the former statute had provided a basis for holdings to the effect that orders of remand are not self-executing, and that omission of that provision from the present statute is indicative of a legislative intention to remove that basis (brief, pp. 27-29).

Examination of the authorities discloses that the significance generally attributed to the immediate execution provision of the former statute was exactly opposite to that which respondent ascribes to it. The word "immediately" had been used as an argument *in support* of the view that remands were self-executing, and not against that view, as respondent suggests. *Bucy* v. *Nevada Construction Co.* (9th Cir.), 125 F. 2d 213; *Leslie* v. *Floyd Gas Co.* (E. D. Ky.), 11 F. Supp. 401; *Ausbrooks* v. *Western Union Telegraph Co.* (S. D. Ala.), 282 Fed. 733. And while the argument had been unsuccessful in the only appellate court to consider the matter [*Bucy* v. *Nevada Construction Co., supra*], it had been accepted in occasional District Courts [*Leslie* v. *Floyd Gas Co., supra; Ausbrooks* v. *Western Union Telegraph Co., supra*].

Thus, if the elimination of the provision has any meaning in this connection, it is as a rejection, and not as an adoption of the view that remands are self-executing. This is confirmed by Moore's treatment of the subject in which, adverting briefly to the *Bucy* decision, he states (Commentary on the 1949 U. S. Judicial Code, p. 286):

> "Despite the strong language of the former statute to the effect that when the district court orders the case remanded 'such remand shall be immediately carried into execution', it was held that this did not instantly deprive the district court of jurisdiction.

> This meant that steps were to be taken promptly to carry the remand into effect, but until these steps were taken the district court had power to vacate its order. This should be true under the amendment of 1949 since it does not command immediate execution of the remand order."

Respondent is incorrect when he argues that Judge Hand's stay was illegal because, he claims, issued in furtherance of an attempt to review an order of remand. As we have seen, there is no effort here to review any order of remand but only proceedings other than the remand itself.

Equally unsound is respondent's further suggestion that Judge Hand's stay was illegal because, in any event, it required *postponement* of the remand. As already noted, the present statute contains no prohibition against such postponement and no direction for immediate execution. Indeed, respondent is apparently aware (respondent's brief, p. 29) that the revisors intentionally refrained from adopting such a provision at the time of the 1949 amendatory act, when they reinserted the "substance" of the former statute, *i. e.*, the prohibition against review, which had been inadvertently omitted at the time of the enactment of the 1948 Code.*

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* Under the former statutes, the only modes of review *expressly* prohibited were appeal and writ of error. 28 U. S. C. (1940) §71. Mandamus and the other extraordinary writs were held to be unavailable both by analogy from that specific prohibition and by inference from the immediate execution requirement. *Ex parte Pennsylvania Co.*, 137 U. S. 451, 453-4. The 1949 amendment makes the prohibition against review by extraordinary writ explicit and deletes the ambiguous "immediate execution" clause. Thus, the report of the Congressional Committees states that the present statute continues "the former law as to the finality of an order of remand to a State court. * * *" 81st Cong., 1st Sess., H. R. Rep. 352, Sen. Rep. 303, 2 U. S. Code & Cong. Serv. 1268.

In short, Judge Clancy's signing of the purported order of remand constituted a violation of a valid stay issued by an appellate judge. Before any execution had been attempted, Judge Clancy was apprised of the stay's existence and revoked his act. It is clear, we submit, that Judge Clancy's revoked act has not destroyed this Court's jurisdiction, and that the petition for certiorari may be entertained.

Finally, apart from the foregoing and assuming, *arguendo*, that remand has taken place, this Court nevertheless has jurisdiction to review the proceedings which were completed prior to that time. In *Waco* v. *U. S. Fidelity & Guaranty Co.*, 293 U. S. 140, this Court, and later the Court of Appeals (76 F. 2d 467), held that appellate jurisdiction over the completed Federal proceedings might be exercised notwithstanding the intervening execution of a remand.

CONCLUSION

The petition for certiorari should be granted and the motion for certiorari to correct diminution of the record should be denied.

Respectfully submitted,

MYLES J. LANE,
Counsel for Petitioner.

HERBERT P. JACOBY,
STUART G. SCHWARTZ,
of Counsel.